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REPORTS

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

FROM DECATUR TERM, 1850, TO MILLEDGEVILLE
(MAY) TERM, 1851, INCLUSIVE

THOS. R. R. COBB, REPORTER.

VOL. IX

1851

Law School

ATHENS, GA, CINCINNATI COLLEGE.

CHRISTY & KELSEA.

1851.



Entered according to the Act of Congress, in the year 1851, by THOMAS
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AT MILLEDGEVILLE.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT DECATUR,

AUGUST TERM, 1850.

Present—JOSEPH H. LUMPKIN, }
HIRAM WARNER, } Judges.
EUGENIUS A. NISBET, }

No. 1.—ANDERSON BOGGS, adm'r, &c. of Robert Watson, plaintiff in error, vs. JESSE CHAMBERS and others, defendants in error.

[1.] Although Courts of Equity have concurrent jurisdiction with Courts of Law in cases of partition, as a general proposition, yet, in this State, if the party seeking to have a partition of lands, has an ample and adequate remedy in a Court of Law, according to the provision of our Statute upon that subject, a Court of Equity will not assume jurisdiction; but when it appears from the case made, that there is any obstacle or difficulty in the way, so as to render the remedy at Law less ample or adequate, a Court of Equity will maintain its jurisdiction to remove such obstacle, and compel a discovery of the rents and profits, and decree an account of the same.

In Equity, in Carroll Superior Court. Demurrer, decided by Judge HILL, October Term, 1849.

This was a bill in Equity, filed by the plaintiff in error against the defendants. The bill alleges, that the complainant and

defendants became possessed of a lot of land in the County of Carroll, upon which there were valuable gold mines, as tenants in common; that the defendants entered upon said land sometime in the year 1830, and had continued to work the mines, situated thereon, ever since, realizing therefrom a large amount of gold, which they had appropriated to their own use, refusing to pay to the complainant any portion of the same. The bill further charges, that without giving the complainant any kind of notice, the defendants had fraudulently proceeded to have the said lot of land partitioned and divided between all the parties at interest, setting apart to the complainant a portion of said tract of land, upon which the defendants knew no gold was to be found, and causing all the gold-mining interest to be divided between themselves, for the purpose of defrauding the complainant.

The bill prayed that complainants might be compelled to account for the gold obtained by them from said mines, and pay to him that portion of the same to which, in equity, he might be entitled; also, that the partition which had been made might be set aside, and such portion of said land might be set apart and decreed to complainant, as he might be entitled to under and by virtue of his undivided interest in the same.

To this bill there was a demurrer filed upon two grounds: want of equity, and multifariousness.

The Court sustained the demurrer and dismissed the bill, and counsel for complainant excepted.

A. T. BURKE, for plaintiff in error.

By the Court.—WARNER, J. delivering the opinion.

The case made by the complainant's bill is for a partition and account. The complainant alleges, that he is a tenant in common with the other defendants, of a lot of land upon which is a valuable gold mine; that the defendants have entered upon the lot and worked the gold mine, and extracted therefrom a large amount of gold, for which they refuse to account with him.

The complainant also alleges, that the defendants have fraudulently proceeded to have the said lot of land partitioned and divided between themselves and the complainant, without giving him any notice thereof, and setting apart a portion of the lot to him, upon which defendants knew there was no gold to be found, and causing all the gold-mining interest thereon to be divided between themselves. The prayer of the bill is, that a partition of the land may be decreed between the complainant and defendants, the alleged fraudulent partition of the land set aside, and that the defendants be decreed to account for the gold which they have extracted from it.

[1.] As a general proposition, it may be stated, that Courts of Equity have concurrent jurisdiction with Courts of Law, in all cases of partition. 1 *Story's Equity*, 599, §646, 610, §658. But in this State, if it shall appear that the party applying to a Court of Equity has as ample and adequate remedy in a Court of Law, under the provisions of our Statute, as he would have in a Court of Equity, the latter Court will not assume jurisdiction to award a partition. Does the case made by the complainant show, that his remedy in a Court of Law would be as ample and adequate to afford him relief, as in a Court of Equity? We think not, for the reason that the defendants have placed an obstacle in his way, by having the alleged fraudulent partition made of the land, and for the further reason, that they have proceeded to extract therefrom a large amount of gold, which they have appropriated to their own use. The complainant is entitled to a *discovery* from them of the amount of gold which they have obtained from the land, and a decree for his proportionable share, as consequent upon that discovery. Where one tenant in common has been in the exclusive enjoyment of the rents and profits, on a bill for partition and account, the latter will also be decreed. 1 *Story's Equity*, 608, §655.

By maintaining the jurisdiction of the Court in this case, the complainant will not only be entitled to the aid of the Court to remove the fraudulent obstacles created by the defendants, in having a partition of the land, but will also have the assistance of the Court to compel a *discovery* of the rents and profits of the

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land, and a decree therefor, as well as a decree for partition, without resorting to another suit, to accomplish that object in the Common Law Court. This bill is not multifarious, according to the ruling of this Court, in *Butler and others vs. Durham, & Kelly*, 413.

Let the judgment of the Court below be reversed.

No. 2.—NAPOLEON B. BEARD and another, plaintiffs in error, *vs.*
THOMAS SIMMONS, defendant.

[1.] Where a promissory note is declared on, which on its face is barred by the Statute of Limitations, and the defendant pleads the Statute, the plaintiff may, under our judicial system and practice, amend his declaration, by alleging a new promise by the defendant, so as to prevent the operation of the Statute.

[2.] A new trial will not be granted on the ground of newly discovered evidence, when the party making the application might, by the exercise of due diligence, have procured it before the trial.

[3.] Nor will a new trial be granted on the ground of newly discovered evidence, merely to give the party an opportunity to *impeach* the credit of a witness sworn on the trial.

Debt, in Bibb Superior Court. Tried before Judge STARK,
January Term, 1850.

This was an action of debt, brought by the defendant in error against the plaintiffs in error, upon several promissory notes made by the plaintiffs to one Aaron Lessell, as the executor of John J. Lanier. Andy McNeal signed the notes by making his mark thereto. The notes were transferred by Lessell to Simmons. The defendants filed the plea of the Statute of Limitations. McNeal also filed the plea of *non est factum*.

The plaintiff subsequently amended his declaration in the

Court below, by adding a count upon a new promise made by Beard and McNeal to Lessell.

The cause came on to be tried on the appeal, at January Term, 1850, when counsel for the defendants moved the Court to strike out the amendment to the declaration alleging a new promise, which motion was overruled by the Court, and counsel for defendants excepted. Plaintiff then tendered in evidence the depositions of Aaron Lessell, (which had been in Court some six months) to prove that McNeal made his mark to the notes, and also to prove that the defendants had promised to pay the same, in order to take them out of the Statute of Limitations. Lessell further stated in his answers, that a part of the notes were given for property purchased at a sale held by him as executor of Lannier. Simmons had executed to Lessell a release from all liability on account of the notes.

Counsel for defendants objected to the introduction of the testimony. The Court overruled the objection, and the interrogatories were read to the Jury, and counsel for defendants excepted.

Counsel for defendants requested the Court to charge the Jury, that "inasmuch as it appears that McNeal cannot read, that the notes should have been read over to him, or that it should have been explained to him what the notes were, at the time the new promise was made by McNeal, as proved by Lessell, in order to bind McNeal by the new promise; also, that the subsequent or new promise must be shown to have been made after the bar of the Statute had attached, in order to bind the defendants thereon; also, that if any new promise was made, the same was good and binding, and could only be enforced within four years next after the same was made."

All of which charges the Court refused to give, but did charge the Jury, that "if they were satisfied, from the testimony, a new promise was made at any time within six years next before the commencement of the said action, that the same was good and binding, and should be enforced; also, that as McNeal could not read, they should be well satisfied, that when he made the new promise, he knew what he was doing, and what debt or demand it was he was promising to pay, and they must be well satisfied

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that the new promise made by McNeal, and relied on by the plaintiff, to take the case out of the Statute of Limitations, plainly and unequivocally referred to the notes now in suit; also, that a payment made on the notes, by the maker, was equivalent to a new promise, if made within six years preceding the commencement of the suit."

The Jury found a verdict for the plaintiff. Whereupon, counsel for the defendants moved the Court for a new trial, upon the following, among other grounds:

Because the Court erred in not striking out the amendment to plaintiff's declaration.

Because the Court erred in allowing the interrogatories of Aaron Lessel to be read to the Jury.

Because the Court erred in refusing to charge the Jury, as requested by defendants' counsel.

Because, since the trial of said cause, one of the defendants, McNeal, has discovered new testimony, which was, in substance, that the returns of the sale of John J. Lanier's property, by Lessell, to the Court of Ordinary of Bibb County, show that the sale took place after the date of the notes sued on, and which notes Lessell testified were given for property at that sale, &c.

The motion for a new trial was refused by the Court. Whereupon, counsel for defendants excepted, and have assigned error.

POWERS & WHITTLE and HUNTER, for plaintiffs in error.

STUBBS and LESTER, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The first ground of error alleged against the judgment of the Court below is, in allowing the plaintiff's declaration to be amended, by averring the *new promise* of the defendants, so as to take the case out of the Statute of Limitations. According to the practice of the Courts in England, when the notes are barred by the Statute on the face of the declaration, the defendant pleads the Statute of Limitations, if he intends to insist on it as a de-

fence. In order to avoid the effect of a plea, the plaintiff puts in his *replication*, averring a new promise. In this State, the plaintiff is not allowed to file his replication, inasmuch as *special* pleading is prohibited, and the parties are at issue when the declaration and answer shall be filed. Amendments, however, are allowed by Statute to be made to the declaration and answer, regulated by our rules of practice, so as to prevent surprise and injustice. The declaration in this case showed a *cause of action*, and but for the *defendant's plea*, availing himself of the Statute of Limitations, the plaintiff would have recovered a verdict. When the defendant manifested his intention to insist on the Statute by his plea, the plaintiff could not reply on the record a new promise, as in England, but he moved the Court to amend his declaration, by alleging a *new promise*, for which the *original indebtedness*, as set forth in the declaration, formed the *consideration*. The amendment was, in our judgment, properly allowed by the Court below, under our Judiciary Act and Rules of Practice.

The general ground of error insisted on, is the admission of the testimony of Lessell, the payee of the notes sued on, to prove the *new* promise of the maker, and also to prove the consideration for which the notes were given.

We do not think there was any foundation for this objection, inasmuch as the plaintiff had executed a *release* to the witness from all liability, whatever, on account of the notes. If he was not a competent witness, independent of the release, that made him so. The third ground of error is, that the Court refused to grant a new trial on the ground of newly discovered evidence.

Lessell, the witness, testified that the notes sued on were given in part for property sold at the executor's sale.

[2.] The basis for the new trial is, that the defendant has recently discovered, from the returns made to the Court of Ordinary, that the property was not sold until after the date of the notes. The testimony of Lessell, taken by commission, had been in the Clerk's office some six months before the trial, and the newly discovered evidence being matter of record, equally accessible to both parties, the Court below held, that the defendant had not exercised proper diligence in endeavoring to procure it. It may

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be stated to be an established rule, that a new trial **will not** be granted on account of evidence discovered after the trial, which, by using due diligence, might have been discovered before. *Knorr vs. Work*, 2 *Binney's Rep.* 582.

[3.] Nor will a new trial be granted on the ground of newly discovered evidence, merely to give the party an opportunity to *impeach* the credit of a witness sworn at the trial. *Burns vs. Hloyt*, 3 *John. Rep.* 255. *Durgee vs. Dennison*, 5 *John. Rep.* 248. The motion for a new trial was properly overruled, on the ground of newly discovered evidence. The next ground of error alleged upon the record is, to the charge of the Court to the Jury.

We have examined the charge of the Court as applicable to the state of facts contained in the record, especially the date of the credits made upon the notes, as well as the time at which the new promise was made, and we are of the opinion the Court did not err in its charge to the Jury, but that the law of the case was properly stated by the Court, and that there was no error on the part of the Court in refusing to charge as requested by defendant. The evidence clearly shows a new promise, on the part of the defendant, to pay the notes *before* the Statute had ~~interposed~~ its bar.

Let the judgment of the Court below be affirmed.

DECATUR, AUGUST TERM, 1850.

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No. 3.—**ELIJAH BOND**, claimant, and **J. J. BENNETT**, defendant in execution, plaintiffs in error, vs. **MOSES BALDWIN**, defendant.

- [1.] When there is a rule for a new trial, and the decision of the Court on the grounds taken in the rule is excepted to, it is not competent for plaintiff in error to except to decisions made on the trial, not excepted to at the time, and not embraced in the rule.
- [2.] The admission of illegal testimony on the trial, not objected to at the time, is not a good ground for a new trial, and the refusal of a new trial upon that ground will not sustain a writ of error to this Court.
- [3.] A certificate in bankruptcy may be attacked and opened in a State Court, when it impedes or conflicts with the rights of a party litigating there, so far as that party's rights are concerned.
- [4.] Upon the trial of a claim upon an issue between the claimant and the plaintiff in execution, upon the question of fraud, in the procuring of a discharge in the Bankrupt Court, by the defendant in execution, the mercantile books of a firm, of which the defendant in execution was a member before his application in bankruptcy, are admissible to show that he was owner of an interest in that firm, not returned in his schedule.
- [5.] This Court will not control the discretion of the Circuit Court in refusing a new trial, upon the ground that the Jury found contrary to the evidence, but in clear and strong cases of injustice.
- [6.] All the acquisitions of a bankrupt, made after the filing his petition in bankruptcy, are exempt from liability to pay debts previously contracted.

Claim, in Bibb Superior Court. Tried before Judge STARK, January Term, 1850.

In this case the defendant in error joined issue, with a protestation, because the writ of *fi. fa.* given in evidence in the trial of the cause, was not copied in the bill of exceptions; and, also, that certain documentary testimony which was given in evidence in the trial below, did not appear in the bill of exceptions.

The Court held, that the record and bill of exceptions contained sufficient to enable them to decide the points made, and the errors assigned.

A *fi. fa.* issued in 1842, in favor of Moses H. Baldwin against John J. Bennett, from Bibb Inferior Court, was levied upon a negro by the name of Martin, in October, 1845, as the property

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of Bennett. A claim was interposed to said negro by George M. Logan, on the 28th October, 1845, which claim was withdrawn by him at July Term, 1848.

George M. Logan and John J. Bennett were merchants and partners in the city of Macon. On the first day of March, 1842, a notice of dissolution appeared in the gazettes published in Macon. Bennett retired, while Logan continued in business.

In October, 1842, the negro boy, Martin, and another by the name of Sam, were sold at Sheriff's sale, as the property of Bennett, and Logan became the purchaser. The Sheriff delivered the negro boys to Logan, who paid the purchase money.

In January, 1843, Bennett filed his petition in bankruptcy, and a certificate of discharge was duly granted in September, 1843.

After the levy, and before the Court to which the *fi. fa.* and claim were made returnable, Logan sold and delivered the negro boy, Martin, to Elijah Bond, the plaintiff in error.

After Logan withdrew his claim, Bond became the claimant.

While the claim was pending, the plaintiff in *fi. fa.* notified the claimant and defendant in *fi. fa.* that he would attack and impeach the decree and certificate of discharge in bankruptcy, on the ground of fraud and wilful concealment by Bennett, the bankrupt; specifying the negro boy, Martin, and the interest of Bennett in the store of George M. Logan; insisting that no real dissolution had taken place, but that Bennett had an interest in the store at the time of filing his petition in bankruptcy.

On the 11th August, 1845, Logan and Bennett formed a new partnership in business, under the firm name of George M. Logan & Co. and Bennett paid into the concern about \$3000, with which he was credited on the books.

On the trial of the cause at February Term, 1850, much testimony was submitted to the Jury, of which the following is a brief:—

William Gunn stated, that Bond had said he made the trade with Bennett for Martin, but Logan made the title. This conversation was pending the claim by Logan.

George M. Logan bought Martin in 1842, and held him until 1845 or '46; made the bill of sale to Bennett, November 13,

1845, for the two negroes, Martin and Sam; Bennett was my agent when I purchased these negroes, and having once owned them, he desired to buy them when he got able. On Bennett paying me \$900, the receipt in evidence, dated the 13th of November, 1845, was given to Bennett. When Bond bought the negro boy, the proceeds were paid to me, and passed to Bennett's credit, and the reason why I claimed was, because Bennett had not paid all the purchase money. Bennett may have made presents to the negroes.

James Dean signed indemnity bond, made by Bennett to Bond, in January, 1849, to secure Bond, and Bennett secured me by notes.

J. L. Saulsbury hired Sam in 1844, and had some conversation with Logan and Bennett on the subject; think I gave the note to Bennett; paid the note at Logan's counting-room, but to whom does not know; frequently saw Bennett about Logan's store.

The books of the Merchants' Bank of Macon were introduced, which showed that the note of Saulsbury was made payable to Bennett, and by him indorsed.

The books of George M. Logan were submitted in evidence, to show that there was no dissolution.

John B. Stow is acquainted with book-keeping; the books show no partnership and no dissolution.

George M. Logan, re-introduced.—The dissolution took place in March, 1842, and was not formed again until August, 1845; Bennett had no interest during that time, either in the store or in the negroes, Sam and Martin; the \$3000 entry, made 1st March, 1842, was for Bennett's entire interest in the concern, and the error in the books consists in not charging profit and loss account; there is a credit to Bennett in the books, but it occurred since the new partnership in August, 1845.

In his charge to the Jury, Judge *Stark* stated, that "the discharge in bankruptcy is a full and final acquittance of the defendant from the debt, unless successfully impeached for fraud, and that by sufficient proofs; but if the defendant, at the time of his application for the benefit of the Bankrupt Law, owned the slaves, Martin and Sam, and had a valuable interest in the firm

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of G. M. Logan & Co. then it was his duty to have included these slaves, as well as his interest in said firm, in his schedule, and his failure to do so is such a fraud as renders the discharge in bankruptcy a nullity, and you should find the property subject; but if the schedule is a full, faithful and fair account of all Bennett's estate at the time, all the property acquired by the bankrupt, since the discharge, is exempt from the payment of his debts previously contracted."

The Jury found the property subject to the execution; whereupon counsel for claimant moved the Court for a new trial, upon several grounds, of which it is only necessary to give the following:—

1st. Because the Court erred in ruling that the judgment of the Circuit Court, sitting in bankruptcy, could be attacked for fraud, collaterally in this Court, whereas the attack should have been made in the Court where the judgment was pronounced.

2d. Because the Court erred in permitting the books to be submitted to the Jury, as evidence against claimant, or as against John J. Bennett.

3d. Because the Jury found contrary to law and evidence.

4th. Because the Court charged the Jury, "that if the schedule filed by Bennett was a full, faithful and fair account of all Bennett's estate, at the time, all the property acquired by the bankrupt, since his discharge, was exempt from the payment of his debts, previously contracted;" but should have charged, that the acquisitions of the bankrupt, from the *filing of his petition in bankruptcy*, are not subject to the payment of his debts previously made.

The Court overruled the motion for a new trial, and counsel for claimant excepted.

MCDONALD, STUBBS, HALL and POWERS, for plaintiffs in error.

HINES & HINES, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] Issue was joined in this case with a protest. In the pro-

it is assumed that no question can be considered by this court, that is not raised on the rule nisi for a new trial. We recognize the correctness of this assumption, and will pass upon the point, made in the bill of exceptions, that is not made in the record, and for the following reasons: A new trial was moved in this case and refused by the Court. The bill excepts to this decision, and error is claimed to have been committed, and is assigned upon all the grounds specified in the rule for a new trial. This is very well. But the bill of exceptions goes behind the record, and charges divers errors upon the Court in its rulings on the trial, and the assignment, in this regard, follows the bill. These rulings on the trial *were not excepted to at the time*, and not being taken in the rule as grounds for a new trial, were not excepted to in the exception to the decision of the Court on the record. They have, consequently, no where and at no time been excepted to, and for that reason cannot be considered by this court. 7 *Howard's Miss. R.* 414. 24 *Wend.* 496. 12 *Ohio* 32. 6 *Blackf.* 417. 1 *Scam.* 281. 4 *S. & M.* 113. 7 *Cr.* 270. 2 *Brock.* 75.

The protest farther claims, that the Court shall pass no judgment upon this writ of error, but that the same be dismissed, because the execution which was levied upon the property in dispute, is not sent up. The rule of this Court is, that the plaintiff or petitioner must bring up all the evidence, documentary or by parol, which is necessary to elucidate the questions made for review. If he does not, the defendant has the right to move for a dismissal of the writ, and if he fails so to move, the Court will, upon its own motion, confirm the judgment below. Under this construction of our rule, the question is this: is the execution necessary to elucidate any point taken in the bill? Can we fairly and justly adjudicate all the points made without it? We think we can. We see no purpose, whatever, which the execution could subserve, if it was here, but to show the lien and the effect of the judgment which is sought to be enforced. There is no contestation, whatever, about the lien of the judgment. On the contrary, throughout the record, the existence of the judgment

ment and its date, are conceded. Upon this ground, we overrule the protest.

[2.] One of the grounds taken for a new trial in this rule is, the admission of evidence on the trial contrary to law, which was *not objected to on the trial*. It is our opinion that the admission of evidence on the trial, contrary to law, which is not objected to at the time, is not a good cause for a new trial. The party, against whom it is admitted, by not objecting and invoking a decision of the Court, is held to waive his objection, and is bound by that waiver. This being true, it is not error in the Court to refuse a new trial because illegal evidence was admitted without objection, and a writ of error in such a case will not lie to this Court. We do not apply this opinion to this case, but consider it just to the profession to announce, that to this effect will be our judgment whenever the point is made. *Tidd's Practice*, 907, 908, *marg. p.* 1 *T. R.* 717. 1 *Bos. & Pull.* 429, *note a.* 1 *Mills' Const. Reps.* 296. 1 *Wash. C. C. R.* 440. 5 *Pick.* 217. 11 *Pick.* 469. 7 *S. & R.* 219. 4 *Pet.* 102. 11 *Ibid*, 185. 4 *Humph.* 27. 4 *Sheph.* 187. 5 *Blackf.* 436.

I shall not undertake to consider each one of the very numerous specifications of error found in this assignment. There is really but four or five questions raised. In considering them, I shall dispose of the case.

[3.] And first, it is claimed that the presiding Judge erred in holding that the Superior Court had jurisdiction over the certificate in bankruptcy of the defendant in execution, Mr. Bennett. The position taken by the plaintiff in error is, that it is competent to attack and set aside that certificate only in the Court where it was granted. If it is intended to annul, altogether, a judgment, rendered by any Court, as a general rule, the proceeding must be instituted before the Court that rendered it; so as to the judgment in bankruptcy. But it is also true, that if, in the exercise of its rightful jurisdiction, the certificate in bankruptcy impedes or prevents the rights of a party before the Superior Court, or any other Court, it may be there attacked for fraud and opened, so far as that party's rights are concerned. The certificate in bankruptcy was set up in this case in bar of the right

of the plaintiff in execution to collect his money on the judgment out of the property levied upon. It was introduced to protect the title of the claimant. We hold that it was competent for the plaintiff in execution to attack it for fraud. The Act of Congress declares that the certificate may be plead as a full and complete bar to all suits brought in any Court of judicature whatever, unless impeached for fraud, on prior reasonable notice being given of such fraud, &c. By the Act, the right to impeach it for fraud is given. See *Bellamy & Co. vs. Woodson*, 4 Ga. Reps. 179. *Flournoy vs. Newton*, 8 Ga. R. 309. 8 Alabama R. 858.

[4.] It is farther assigned for error, that the partnership books of G. M. Logan & Co. were admitted in evidence at the instance of the plaintiff in execution. The execution was levied upon a slave named Martin, and a claim put in by Mr. Bond. Aside from the discharge in bankruptcy of Bennett, the defendant in execution, it is not pretended but that the lien of the judgment attached upon the slave. The claimant plead the discharge, in bar of the lien of the judgment, and the plaintiff in execution gave notice, under the Act of Congress, that he would impeach the certificate of discharge, on the ground of fraud and wilful concealment and suppression in his schedule, returned to the Bankrupt Court, of a part of his effects, specifying the slave Martin and the interest of Bennett, the bankrupt and defendant in execution, in the firm of G. M. Logan & Co. Logan & Bennett were engaged in business prior to March, 1842, at which time a notice of dissolution appeared, and, as testified by Mr. Logan, Bennett retired from the concern, Mr. Logan continuing the business. This was before Bennett had filed his petition in bankruptcy. In August, 1845, Logan and Bennett formed a new partnership. This was after Bennett's discharge. The books of the old firm were used and continued for the purposes of the new concern. The books show no settlement of the first partnership, and no opening of the new firm. They exhibit a considerable amount standing to the credit of Bennett. The invoices into the books are, some of them, made out in the name of G. M. Logan & Co. and that during the time that Bennett was stated to be out of the business, Logan bought Martin, and another slave, Sam, in October, 1842,

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as the property of Bennett, at Sheriff's sale. In November, 1845, he sold them back to Bennett, receiving a part of the purchase money, and reserving the title to himself until the balance was paid. In January, 1846, Logan & Bennett (Bennett not having paid the balance of the purchase money) sold Martin to the claimant, Bond, Logan making the title. The proceeds of this sale, Mr. Logan testifies, were paid to him, and by him passed to Mr. Bennett's credit on the books. So the books in 1846 exhibit a credit for the purchase money of Martin in Bennett's favor. These facts, in relation to the books, and what they exhibit and what they purport to be, are to be known, that their admissibility may be determined. Now, the issue before the Court was upon the certificate in bankruptcy, and it was this: was there a fraud or not on the part of Bennett, in procuring this certificate, by withholding from his schedule of effects these two negroes, or any interest which he held in them, or by withholding any interest which he held in the firm of G. M. Logan & Co.? In other words, (for the issue comes down to that,) was Bennett interested in these negroes? and had he, either in the old firm or in the business conducted by Logan, individually, after the dissolution, any interest? The schedule, it is conceded, contains no return of any such interests. If he had no such interests, the allegations of fraud are unsupported; if he had, such interests, failing to return them, his discharge is fraudulent, and ought to be set aside. It was, then, an issue of fact, and the question simply is, were these books admissible to elucidate that issue? Divesting thus this point of the facts extraneous to it, and stripping it of the subtleties which the ingenuity of counsel has thrown around it, we do not consider it very difficult. We have seen that the certificate may be attacked for fraud, when, in this jurisdiction, it is in conflict with the rights of a party. It is set up in this case to defeat the lien of the plaintiff's judgment. It is replied to by an allegation of fraud in this: that the defendant in execution did not make a full return of his effects, with the specifications farther, that at the time of making it, he held an interest in, or was, in fact, the equitable owner of the very slave now levied on; and that he held, and was owner of an interest in the firm of G. M. Logan

& Co. which are not returned. The question then is made, as before stated, was he such owner, or had he such interest? There is nothing in the character of the case (a claim) which will exclude this evidence. The contest is between the plaintiff in execution and the claimant. The plaintiff in execution relies primarily upon the lien of his judgment, which binds all the present property and future acquisitions of the defendant. The claimant sets up the certificate in favor of the defendant in execution, which primarily discharges him and his future acquisitions from liability on the judgment, and thus asserts the nullity of the judgment. The issue on the certificate is tendered by the claimant. He cannot object to the reply which the plaintiff makes to it. He has no legal right to evade the issue; and if so, he cannot object to any evidence legally applicable to that issue. It is as competent for the plaintiff to deny the legal effect of this certificate, as it would be to deny the force and effect of any muniment of title which the claimant might produce. The claimant claims under Bennett; for the evidence is, that he bought of Logan & Bennett, paying the purchase money to Logan, which was passed to Bennett's credit. The parties, no doubt, considering that although the legal title to Martin was in Logan, yet that Bennett was the equitable owner. Bennett is not, technically, a party to the issue, and really has no interest. The *bona fides* of his return is in issue, and upon that, he is in Court represented by the claimant. What right has he to complain? It was plausibly argued, that claimant claimed through Logan, a third person, and therefore, the business relations, between that third person and Bennett, ought not to be adduced to disturb his title; to which it is replied, that if that be so—yet it is competent for plaintiff to show that Logan bought from Bennett, and that Logan's ownership was colorable, and designed, from the beginning, to shield this slave from the operation of the Bankrupt Law—that the title did never pass from Bennett, and therefore, the slave ought to have been returned. In this view of it, the books, showing that the purchase money paid by claimant, was passed to Bennett's credit, particularly taken in connection with other facts, were admissible. Again, the title of Mr. Bond was through Bennett. He was the

virtual vendor, as is demonstrated in his getting the purchase money, and in this: that he indemnified the title by bond and security to Mr. Bond—Mr. Logan being released by Bond on his warranty title to him. Aside from all this, Bond, the claimant, defends against the judgment, by the plea of the certificate. Thence sprang the question of fraud or not. No objection, to my mind, can be made to the admissibility of this evidence, from the relation which the defendant in execution bears to the cause.

The evidence was pertinent to the issue. The books contain statements which were proper to be submitted to the Jury relative to Bennett's interest in the firm of G. M. Logan & Co. The invoices were, some of them, made out in that name, and they exhibited credits standing in his favor to a considerable amount unsettled and unexplained by the books themselves. They show no settlement of the old business, and no opening of a new business. These facts were, in our judgment, proper to be sent to the Jury for them to consider in determining the question of fraud in the certificate. In passing upon their admissibility, we are not to consider the explanations of the books made by Mr. Logan, after they were admitted. The record does not show that any objection was made on the trial to their admissibility. Mr. Logan was examined to explain the books. That was right. Our duty by this record is to say, whether these books, as thus appearing, were upon their face admissible.

Being pertinent to the issue, they were admissible, as containing the firm relations of the partners. They are the records of the firm kept by them, or by a common agent, to which Bennett had access, and are, in the nature of admissions, by all the members of the firm as to the facts which they set forth. They are evidence for the plaintiff to prove fraud, as showing, by the assent of both Logan and Bennett, the interest in the firm which they exhibit Bennett to have held. They ought first to be shown to be the books of that firm. Doubtless they were. No point on this head is made by the record.

We are satisfied that this assignment cannot be sustained.

[5.] One of the grounds taken in the rule for a new trial is, that the verdict of the Jury was contrary to the evidence, and it is

insisted with much zeal, that the Court erred in not granting it on that account. The rule over and over again, laid down by this Court is, that it will not control the discretion of the Court below in granting or refusing a new trial, because the verdict was contrary to evidence, but in strong and unequivocal cases. The verdict must be without evidence, or against the clear and unquestionable proof made in the case: If the evidence is simply conflicting, we will not interfere. Nor will we interfere where the decided preponderance of evidence is against the verdict. Even if the evidence is *slight*, upon which the verdict rests, we will not disturb it. If the verdict is so manifestly unjust as to constrain the Court to believe that the Jury acted from prejudice or corruption, we will set it aside. This belief must be irresistible. It is obvious that the rule cannot in these cases be singly stated in precise words. That the Court below is clothed with power to prevent injustice by setting aside the verdict, is not questioned. To prevent manifest injustice, the Court has paramount authority over the verdict; whilst at the same time it is the appropriate function of the Jury to decide upon the facts. That function we are studiously careful not to permit the presiding Judge to exercise. Whether he will or will not disturb the verdict, is necessarily left to his discretion, regulated by the law as settled in the books. We will control that discretion, but with great forbearance, and only when it has been palpably exercised in promoting injustice. His discretion is more latitudinarian than ours, and we will not control that by reversing his action, even in cases where, from the record, we might be led to believe we would have acted differently; because, from his position relative to the cause, he has better means of knowing whether the Jury abused their power over the facts, than we can have through the record. See *Roberts vs. the State of Georgia*, 3 Kelly, 322, '3. 1 Kelly's R. 618. *Mays vs. Stroud*, 7 Geo. R. 269. *Flournoy vs. Newton*, 8 Geo. R. 311.

We cannot interfere in this case. It falls within none of the cases where we have granted a reversal. It is not a case where there is no evidence to sustain the verdict; the verdict is not against uncontradicted and unimpeached evidence, nor is it so

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manifestly unjust as to constrain us to believe that the Jury acted from prejudice or corruption. The Jury found for the plaintiff in execution; they set aside the certificate of bankruptcy; they therefore believed from the evidence, that Bennett either had an interest in the two negroes or in the partnership, which he did not return. Now, it is insisted in the argument, that there is in this record no evidence that he had such an interest, but that, on the contrary, Mr. Logan proves directly that he had no interest in the negroes or in the partnership. Mr. Logan does testify that he had no interest in either, and it is not attempted to impeach his credibility. Yet his testimony is not uncontradicted. The books were in evidence, and they do afford some evidence that he had an interest in the firm of G. M. Logan & Co.; for example, they show a credit in his favor for a considerable sum of money, and exhibit no final settlement of the concern. They show, too, evidence to some extent that he was interested in the business after the alleged dissolution, and whilst it was conducted by Mr. Logan individually. They exhibit invoices made out in the name of G. M. Logan & Co. the old firm name. They also afford some evidence of the ownership of the negroes by Logan, being merely a cloak, and that Bennett was interested in them; for they show that the purchase money paid by Mr. Bond for Martin was passed by Logan to his credit on the books. There is other evidence of his being interested in the negroes. It is proven, for example, by Mr. Saulsbury, that whilst Logan was the alleged owner in 1844, he gave his note to Bennett for the hire of one of the negroes, and this is confirmed by the testimony of Mr. Rutherford, that this note was deposited in bank, and was made payable to Bennett. It is said, however, that this evidence is slight, and ought not to weigh against the positive testimony of Mr. Logan, whose credibility is unimpeached. That may be true. The question is not what we may believe as to the weight of evidence, or what we would have done as Jurymen. The question simply is, was there any conflicting evidence? If there was, we cannot disturb the verdict, because the Jury have the exclusive right to weigh the evidence, reconcile conflicts, and determine what force is to be given to any portion of it. There was some

evidence on both sides of the question in this case. But it is ingeniously argued that Mr. Logan removes the conflict between his testimony and that of the books, that his explanations of the books destroy all proof of what they exhibit as Bennett's interest in the negroes and in the partnership, and that the books are to be considered as evidence before the Jury, as thus explained, and not otherwise. In this light, argues the counsel, there is no conflict of testimony. It may be true, in point of fact, that Logan's explanations do altogether neutralize the evidence which the books contain against Bennett. Still, the books were in evidence as distinct and independent testimony. So was Mr. Logan's statements, both direct and explanatory of the books. The Jury had all before them. It was their province to consider of all the evidence, and they are presumed to have done so, and to have given effect to the explanations. Having found the issue against Bennett's certificate, the inference which we, as Judges, are to draw is, that the explanations, to their minds, were unsatisfactory. Again, it is argued that, in considering the books, the Jury looked to other entries than those submitted to them as evidence, and therefore the verdict is against evidence. The reply to this is, that from the record, the books, as a whole, were in evidence. The record does not show that they were admitted with any limitation or restriction. We are of course to be governed by the record.

[6.] It is claimed by the plaintiff in error, that the Court erred in instructing the Jury that the acquisitions of the bankrupt, Bennett, made *after his discharge*, were exempted from the operation of the judgment, he holding that all acquisitions made from and after the *filing of his petition*, are exempted. The law is, as claimed by the plaintiff in error, and we think according to a fair construction of the charge of the Court, he did so instruct the Jury. The Court says, "if the property was not Bennett's, when he applied for the benefit of the Bankrupt Law, then he had no right to include it in his schedule, and it is not subject;" which is equivalent to saying that the property, to be subject, must belong to Bennett when he applied for the benefit of the Bankrupt Law. If so, the Court meant to say, that property which belonged to

him not until after his application, was not subject. *His application* was the filing of his petition. So, in a like form of expression, the Court again says, “but if the defendant, *at the time of his application* for the benefit of the Bankrupt Law, owned the slaves, Martin and Sam, and had a valuable interest in the firm of Geo. M. Logan & Co. then it was his duty to have included the slaves, as well as his interest in said firm, in the schedule,” &c.

The clause which is relied upon as demonstrating the view of the charge taken by the plaintiff, is as follows; “But if the schedule is a full, faithful, and fair account of all Bennett’s estate *at the time*, all the property acquired by the bankrupt *since his discharge* is exempt from the payment of his debts previously contracted.”

If these remarks were all that was said by the Court on this subject, the true meaning would not be very clear; taken, however, in connection with other parts of the charge, (and that is the only fair way of arriving at its meaning,) we conclude that *discharge*, as here used, has not reference to the certificate and its date alone, but is intended to express the whole process of getting the discharge, which begins with the filing of the petition. Besides, the Court speaks of “all Bennett’s estate *at the time*.” What time? It refers to the time previously designated, to wit: the time of his making application to the Bankrupt Court.

Apart from these things, the question is not made by the record, for there is no evidence that Bennett acquired this property intervening the filing of his petition and his discharge.

Let the judgment be affirmed.

No. 4.—JOHN WHITTINGTON, plaintiff in error, vs. Doe ex dem. Wm. Wright and another, defendants.

- [1.] Where two are in the joint occupancy of land, the one having no title, will, in the absence of all proof, be considered as holding in subordination to him who has the title.
- [2.] Failure to record a deed, concerns no person, except those who derive title from the same feoffor, by a deed of subsequent date.
- [3.] The claim laws are cumulative only, *permissive* and not *mandatory*.
- [4.] Where a person having title to property, of which he is apprised, stands by and suffers it to be sold by the Sheriff, without asserting his title or making it known to bidders, he cannot afterwards set up his claim. And in such case, even infancy would be no protection, provided the minor had arrived at those years of discretion when a fraudulent intent could be reasonably imputed to him.
- [5.] An adverse possession, held during the minority of the true owner, cannot operate against his right.
- [6.] A conflict between the equities of a *bona fide* purchaser and a *volunteer*, can only arise where both parties claim under the same grantor.

Ejectment, in Crawford Superior Court. Tried before Judge STARK.

This was an action of ejectment, brought upon the several demises of William Wright and James Pressnol, against John Whittington, who pleaded the general issue and the Statute of Limitations. At the August Term, 1848, a trial was had, and a verdict rendered in favor of the plaintiff, and an appeal was taken by the defendant. Pending the appeal, the defendant, James Pressnol, filed his bill in Equity, to perpetually enjoin the action of ejectment from proceeding.

The bill alleged that Wm. Wright gave in for a draw in the land lottery of 182—, and sold said draw to one Jacob Pressnol, of the County of Walton, for a valuable consideration; that Wright drew in said lottery lot of land No. 86, in the 2d district of originally Houston, now Crawford County, the same for the recovery of which the action of ejectment was instituted; that at the time of said transfer, there was a judgment against the said Jacob Pressnol and others, in favor of one Henry Millisons, open

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It was shown that a *fi. fa.* issued upon said judgment was sold by the Sheriff of Crawford County, on the 1st of January, 1834, when one John Waipole was present, and that at said sale no notice was given that there was any outstanding title, or that the title was not in Jacob Pressnol, or said land. On the 15th day of January, 1834, the said conveyed lot of land to Whittington, the complainant. The bill further charged that complainant went into the possession of the land with the knowledge of Wright, Jacob Pressnol, and cultivated it from the year 1834. The bill further charged, that in the year 1823 or '4, Jacob Pressnol entered into the land, and that shortly afterwards, William Wright entered into the land.

The defendant in the answer, which swore off all the equity, and the Court dissolved the injunction, and ordered the action of ejectment to proceed.

By consent of counsel, the action of ejectment and bill were brought on at the February Term, 1850.

The plaintiff introduced in evidence a grant from the State to Wm. Wright, dated the 8th February, 1825—a deed of gift from Wm. Wright to James Pressnol, dated the 4th June, 1832.

The defendant introduced and read the bill and answer thereto, and a deed from the Sheriff of Crawford County to John Waipole, dated 7th day of January, 1834; a quit claim deed from Waipole to defendant, dated the 18th day of January, 1834. Much testimony beside was introduced, which it is not necessary here to give, except that it appeared that Jacob Pressnol and Wright went into possession together in the year 1823 or '4, and Pressnol continued in possession until 1834. It did not appear at what time Wright left the premises. The deed executed by him to James Pressnol recited his then residence in Merriwether County. It also appeared in evidence, that James Pressnol was an idiot at the time of the execution of the deed of gift from Wright to him.

The defendant requested the Court to charge the Jury, that if the plaintiff had notice of the sale by the Sheriff, he should give notice to the defendant on the day of sale and give no-
 tice to the defendant.

tice thereof to the bidders at the sale, the deed of gift from Wright to James Pressnol not being recorded, plaintiff is in Equity estopped from asserting his title against the defendant, provided the Jury believed, from the testimony, that defendant had no actual notice of plaintiff's deed from the grantee, and that notice by the Sheriff's advertisement of sale was sufficient to charge the plaintiff. The Court refused so to charge.

The defendant also requested the Court to charge the Jury, that if they believed, from the testimony, that the defendant was a *bona fide* purchaser for value, without notice, that Equity will protect him, even though his vendor may have had notice. The Court refused so to charge, but did charge, that the defendant in this case was in no better condition than Walpole. The counsel for defendant also requested the Court to charge the Jury, that if they should believe that Whittington was a *bona fide* purchaser for value, he was, under the circumstances, to be preferred to a volunteer; that the lessor of plaintiff is a volunteer against a creditor or subsequent purchaser for value, unless he paid a valuable consideration for the deed of gift. The Court refused so to charge, but did charge, that a *bona fide* purchaser, without notice, may be protected, under such circumstances, against an equitable title; that such a purchase can never operate as a protection against a legal title, and the Court further charged, that the doctrine, as to volunteers, did not apply.

The Court also charged the Jury, that defendant, by the purchase at Sheriff's sale, only became the owner of Jacob Pressnol's title—alleged to be a perfect one under the Statute of Limitations; that in order to make that title a good one, it must have been shown that Jacob Pressnol had been in the peaceable and adverse possession of the land, under claim of ownership, for seven years previous to the sale; that if Wright and Jacob Pressnol were both in possession of the land together, that the law would consider, in the absence of proof to the contrary, that the possession was the possession of the one who had the title; that while they lived together on the land, if the title was in Wright, and the possession was otherwise unexplained, the law would consider Pressnol's possession subordinate to Wright's title, and not as

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adverse to it ; that a possession, to be available under the Statute, must be exclusive of the possession of any one else, except the alleged owner and those claiming under him ; that the joint possession of Pressnol and Wright could not operate so as to vest the title in Pressnol under the operation of the Statute, unless Pressnol claimed adversely to Wright, and to make Pressnol's possession adverse to Wright's, he must have had either the exclusive possession, or Wright must have held under him.

To which charge, and refusals to charge, the defendant excepted, and error was assigned.

HUNTER, HALL and HAMMOND, for plaintiff in error.

POE and NISBET, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

An action of ejectment was brought to the February Term, 1848, of the Superior Court of Crawford County, upon the several demises of William Wright and James Pressnol, against James Whittington, for lot No. 86, in what was originally the 2d district of Houston, but now Crawford County. The general issue, and the Statute of Limitations were pleaded. On the final trial, the plaintiff tendered in evidence a grant from the State to William Wright, dated in February, 1825, and a deed of gift from the grantee to James Pressnol, dated in June, 1832, proved possession in the defendant, the value of the rent, and closed his case. The defendant relied on Sheriff's title. It seems that this same lot of land was sold under execution the first Tuesday in January, 1834, as the property of one Jacob Pressnol, bought by one John Walpole, to whom a deed was made, and who, on the 18th day of the same month executed a quit claim conveyance to James Whittington, the defendant, who was the Sheriff that sold the land. Whittington proved that Jacob Pressnol, together with William Wright, the grantee, and one Kelly, went into possession of the premises in 1823 or 1824, before the land was granted, and that Jacob Pressnol remained there, making im-

provements, and exercising acts of ownership, up to the time of sale in 1832, by the Sheriff, and that Whittington had been in possession ever since. At what time Wright left the land, does not appear. The deed which he made to James Pressnol in 1834, recites, that he was then a citizen of Merriwether County. To aid in the defence of the action at law, Whittington filed a bill setting forth the foregoing facts, and charging that the conveyance to James Pressnol was fraudulently made to defeat the creditors of Jacob Pressnol, who, it was alleged, was the purchaser of the draw of William Wright in the lottery. It further charged a want of notice, actual or constructive, of the claim of James Pressnol, when the land was bought at Sheriff's sale. It prayed a perpetual injunction against the action of ejectment. The answer denied all the equity in the bill, and both cases were submitted to the Jury at the same time.

The presiding Judge instructed the Jury, that if the *fi. fa.* which sold the land had been levied on it as it was, and a claim had been interposed by William Wright, and they would have found the property subject, that their verdict in the present issue should be for the defendant; and further, that if the creditors of Jacob Pressnol could have condemned this land to the payment of *his* debts, that their finding should be for Whittington; that if they believed, from the testimony, that Jacob Pressnol had seven years' continued and adverse possession of the land previous to the sale by the Sheriff, that the legal title was vested in him, and that the purchaser at Sheriff's sale, Walpole, and Whittington, his vendee, acquired a good title.

[1.] That if Wright and Jacob Pressnol were in the joint occupancy of the land, that in the absence of all proof to the contrary, the law would construe it to be the possession of him who held the title, and that Pressnol's possession was in subordination to the title of Wright, and not adverse to it; that a possession to be available under the Statute, must be exclusive of the possession of any one else, except the alleged owner, and those claiming under him; that the joint possession of Wright and Pressnol could not operate to defeat Wright's title, unless Pressnol claimed adversely to Wright.

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I have repeated the substance of that portion of the charge which relates to the actual fraud which might be connected with this transaction, as well as to the Statute of Limitations, and we think that it was not only full, but exceedingly clear and discriminating, and should have been altogether satisfactory to the defendant.

[2.] But it is complained that the Court ought to have instructed the Jury, as it was asked to do, ~~that the~~ failure to record the deed from Wright to James Pressnol, until after the purchase by Whittington, and no actual notice being given of this title, was a fraud upon the defendant, and that James Pressnol, although a minor, was bound, at his peril, to take notice of the Sheriff's advertisement, and to have forbidden the sale. Such is not our understanding of the law. It was neither the duty of William Wright, James Pressnol, nor any body else, to notify the purchaser at Sheriff's sale, that the defendant in execution had no title to the property which was selling. *Caveat emptor*—let a purchaser beware what he does—is the correct doctrine. It is the duty of bidders to inform themselves—to search the records—to exercise all proper caution, that they may not be ignorant of the amount and nature of that person's interest which they are about to buy. *Qui ignorare non debuit quod jus alienum emit.*

[3.] Our claim laws are cumulative, *permissive* and not ~~mandatory~~. They do not take from the owners of property their right to assert their title by trover or ejectment or trespass against the Sheriff, as at Common Law; and a sale by the Sheriff cannot divest the owner of his title, unless he does, or omits to do something, and thereby entraps the purchaser.

[4.] If he is present, and his property is offered for sale, and he stands by and encourages the sale, *or does not forbid it*, and thereby another is induced to purchase the estate, under the supposition that the title is good, neither the owner nor his privies, under such circumstances, will be at liberty to dispute the validity of the purchase. 1 *Fonb.* 163, 164. And even *infancy* will constitute no excuse for such conduct; for infants are not privi-

leged to practice deceptions or cheats on innocent persons. 9 *Mod.* 33.

[5.] But James Pressnol was in a distant County on the day of sale, and knew nothing of what transpired until long subsequently. Neither the rights of infants nor adults would be affected under such circumstances. 1 *Story's Eq. Jur.* §§385, 386.

As to the failure of James Pressnol to have his deed from William Wright recorded, what has that to do with the case? Had his conveyance been from Jacob Pressnol, the defendant in execution, there would have been force in the objection. But the doctrine of registration has no application, we apprehend, to a case like this. What insight could the registration of the deed, from Wm. Wright to James Pressnol, have given any body, as to Jacob Pressnol's title to this land, between whom and the other two parties, the records showed no privity in estate? Had the records shown title at any time in Jacob Pressnol, then it would have been right and proper that the records should have shown title out of him, but it is sufficient to suggest that James Pressnol does not derive title through Jacob Pressnol, but Wm. Wright, the grantee of the land from the State of Georgia. In *Roe and others vs. Doe ex dem. Neal*, (*Dudley's Rep.* 170,) it was decided that the deed, not being recorded, concerns no persons except those who derived title from the same feoffor by a deed of subsequent date to that under which the party claims title.

[6.] But there is another point. Counsel for the plaintiff in error desire to treat Whittington as a *purchaser for value*, and James Pressnol as a *volunteer*, and consequently contend, that in the absence of notice, the former is to be preferred. The answer to be made to this argument is, that admitting Whittington to be the *bona fide* purchaser of Jacob Pressnol's title, how does that give him any preference over a volunteer under William Wright?

The truth is, both parties here are standing on their legal title; the one by *paper*, the other by the *Statute*; and the only question is, which shall prevail? And believing, as we do, that the law of the case has been fairly and forcibly given to the Jury, we do not see that justice requires that a new trial should be granted.

Troutman vs. Barnett and others.

No. 5.—JOHN F. TROUTMAN, plaintiff in error, vs. SAMUEL B. BARNETT, *et al.* defendants.

[1.] At Common Law, a contract which is not tainted with usury in its inception, is not made usurious by a subsequent agreement to pay usury in consideration of forbearance.

[2.] Under the Statutes of Georgia, if a judgment not tainted with usury is transferred, and the transferee agrees with the defendants to forbear its collection for a term of time, in consideration of usurious interest paid him, such subsequent agreement is usurious, and affects the judgment so far as to make the principal due thereon only collectible.

Certiorari, in Crawford Superior Court. Decided by Judge STANLEY, February Term, 1850.

John F. Troutman purchased a judgment against one Arthur F. Walker and Samuel B. Barnett. In order to secure indulgence thereon, Walker executed to Troutman his note for fifteen dollars; afterwards, the judgment was renewed—Walker and Barnett giving to Troutman their notes for the principal and interest due thereon. Troutman brought suit upon the notes, in a Justice's Court in Crawford County, against the defendant, who filed a plea of usury to the same.

On the trial, the Jury returned a verdict for the principal alone due on the notes.

A *certiorari* was taken by the plaintiff to the Superior Court. The Court affirmed the verdict of the Jury, and dismissed the *certiorari*.

To which decision counsel for plaintiff excepted.

STRONG and HAMMOND, for plaintiff in error.

CULVERHOUSE, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] Under the British Statutes of usury, it has been firmly settled, that to defeat a contract on the ground of usury, it must

have been usurious at the time the debt or demand was created thereby. No *subsequent* reservation of usurious interest, or post-mortem arrangement for a usurious security, will taint or invalidate the original claim. Under the English Statutes, such subsequent security will be infected with usury, and the penalty is incurred. But if the original contract be pure, it remains so, and is a valid contract in whosoever hands it may legally fall. *Tate vs. Welles*, 3 T. R. 539. 1 Saund. 295, n. 1. *Parr vs. Ellison*, East. 92. *Phillips vs. Cockayne*, 3 Camp. 119. *Parker vs. Mansbottom*, 3 B. & C. 257, 270. 5 D. & R. 138, 151. 13 Conn. 249. 11 Mass. 359. 19 Johns. R. 394.

I accede to the reasoning upon which this rule is founded. A contract fair, under the law, when made, is fair to the end. As the evidence and rule of the liabilities of the parties, it is fixed, and continues to be the measure of their rights and liabilities, irrespective of subsequent collateral arrangements; and the assignee of such contract, accedes to all the rights of the original payee. So far as it is concerned, it stands unaffected by any usurious contracts growing out of it, either between the maker and the payee, or the maker and the subsequent holder. All this is true and sound, as are the Common Law principles upon which it rests. But when we consider how stringent is the Statute against usury, and how laboriously the Courts have struggled against any evasion of it, and how many technical rules have been broken down to set at naught and annul usurious contracts, I confess that I am astonished that so palpable a *shift*—so clumsy a device as this, should have been so long tolerated. A promissory note for a sum loaned, with lawful interest, and due one day after date, is a valid note. But two days after its date, the parties come together, and it is agreed between them, that for forbearance to sue on that note for one year, the maker will pay 25 per cent. and for such forbearance does pay 25 per cent. Now, such a transaction, so obviously a device to evade the Statute, cannot be reached. The note is good, although it may be a hook whereon to hang usury for years. This is the more remarkable, because the British, and may say, American law-makers, instead of attempting to specify all the cases wherein usury may be found to exist, have laid

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the axe at the root of the tree, by making all shifts, devices and pretences, by which usury is reserved, subject to the law of usury. The Legislature, seeking by such guarantees, to reach any case, when it is within the intention of the parties to pay and receive more than lawful interest. *Lord Mansfield in Lowe vs. Waller, Doug. 739.* The language of our own Statute is very general and comprehensive. The Legislature have charged the Courts in this way, with the duty of preventing usury. The wonder is, that the Courts have not made the subsequent reservation of usurious interest a new contract, embracing within it the old. A good rule, certainly, would be, to hold the subsequent reservation of usury as evidence of an original intent to reserve it. I am aware that such a rule has been refused. See *Fussil vs. Brooks, 2 C. & P. 318. Chitty on Contracts, 705.*

At Common Law, then, the plaintiff below was entitled to recover his principal, with lawful interest, notwithstanding he did receive usury in consideration of forbearance on the judgment. The judgment is not tainted with usury, for the contract on which it is founded was not. Coming into the plaintiff's hands by purchase, he acquired all the rights under it, of the plaintiff in execution, and the renewal of the debt at the expiration of one year, by note, for principal and lawful interest, is but the continuation of the original contract. Upon authority at Common Law, we so rule.

[2.] But this Court is not bound by the English Statutes of usury, and the constructions put upon them by the English Courts. We did not adopt them, for we had a Colonial Act, which was adopted, passed in 1759. *Prince, 294.* Whether the construction of our Act of 1759, by the Colonial Courts, or of the State Courts, up to the adoption of our present Usury Law in 1822, was in accordance with that adopted in England, upon the subject now under review, I have no means of knowing. Of the judgments of these Courts, we have no record. That which does not appear, so far as this question is concerned with the maxim, does not exist. We are, therefore, free to construe the Act of 1822 for ourselves, and are at liberty to carry out the policy and intent of the Legislature in relation to usury. The Act of 1759 made

all usurious contracts void, and subjected the lender to a forfeiture of treble the value of the thing or money loaned. The Act of 1822 repeals the Act of 1759, as to the forfeiture and the making void the whole contract, but declares that the principal due thereon shall be recoverable, and no more, leaving the contract, as to the lawful and usurious interest, void. *Prince*, 295. The Act of 1845 re-enacts, in a different form, the Act of 1822, adding the words, "by or with an incorporated bank, or any other person or persons, whether natural or artificial," and changing the lawful rate of interest from eight to seven per centum. The Act of 1845 is in the following words: "That all contracts, bonds, notes and assurances whatsoever, made after the passage of this Act," by or with an incorporated bank, or any other person or persons, whether natural or artificial, "for the payment of any principal on money, goods, wares or merchandise, or other commodities whatsoever, to be lent, covenanted, to be performed upon, or for any usury whereupon or whereby there shall be reserved or taken above the rate of seven per centum per annum, shall be void and of no effect, except so far as to authorize the recovery of the principal due thereon, and no more." *Pamphlet of 1845, page 35.*

In construing the Act of 1845, the preceding Acts are to be considered, because *in pari materia*. Under the Acts of 1822 and 1845, the contract, so far as the interest is concerned, is upon the same footing with the Act of 1759, so far as the whole contract is concerned; that is to say, it is utterly void. Now, we are to do with the contract, only so far as the interest is concerned; and the question is, under these Acts, is this judgment void as to the interest, on account of usury, because the assignee, occupying the place of the plaintiff in the judgment, agreed with the defendant, in consideration of usurious interest paid him, not to enforce it for a term of one year? We have seen that, at Common Law, it is not void.

According to the reason upon which all laws against usury are based, it is. One of those reasons is, that the money holder, and in this case, the creditor, shall not avail himself of the necessitous condition of his debtor, to exact of him burdensome and

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oppressive terms. The law mercifully restrains both the power and the cupidity of the creditor, by limiting interest upon loans and all contracts to a fixed rate—seven per centum—and to insure against cruel exactions, makes lawful interest irrecoverable, if more is contracted to be paid. Does not the reason apply in this case? Here the plaintiff pays no money in hand to the defendant, but he gives time upon money due, ~~in~~ consideration of usurious interest—he forbears day of payment, because the debtor has paid him usury. It does not differ from an original loan. The money due on the judgment belongs to the plaintiff; it is in the hands of the defendant. It is the same in principle as if the plaintiff had said to the defendant, “you have in your hands so much money which belongs to me; if you will pay me so much interest per annum, you may retain and use it for a year.” To which the defendant agrees, and the contract is closed. Is not that an usurious contract? It is not questioned but that it is, and if remaining executory, could not be enforced. The agreement to pay usury thus, could be defeated by the plea of usury, and clearly, under the old law, would subject the lender to the forfeiture; and if executed, as it was here, very clearly, the usury may be recovered back. But the inquiry goes farther and reaches deeper. Is it not such a new contract as merges the judgment, and defiles that with the taint of usury? The money due on the judgment is the basis of the new contract; it is for the use of that money that the defendants pay the usury; it is in reference to the judgment that the parties contract; it is about it that they “covenant.” Now, if, under the old law, such a transaction would subject the plaintiff to the forfeiture, and it clearly would, I enquire, what would be, in such a case, the forfeiture? It would be treble the value of the money loaned! And what is the money loaned? Why, the sum due on the judgment. Under the new law, the contract has the same relation to the judgment, which it would have under the old law, so far as the interest is concerned. If so, is not the interest forfeited? That is not collectible under the new law. If, under the circumstances, the lender moves (not upon the judgment, for that was extinguished by giving the notes, but upon those notes) to collect

his money, is he not fairly met by a plea of usury under our Statute? The notes are but a continuation of the subsequent agreement, by which usury was contracted to be paid, and which agreement drew after it the judgment. However, as I concede, this reasoning may be obnoxious to some technical objections; yet, I am satisfied that it is fairly drawn from the Statute, and certainly, in strict conformity with its policy. That policy is *to inhibit the taking of usury*, under every and any pretence or contrivance. Note, too, that in this case, the lender occupies, above all others, the position most commanding for taking advantage of the necessitous condition of the borrower. He holds him under execution—one more turn of the screw, and he is crushed. If the Statute of usury cannot prevent the enforcement of this contract, then it needs no argument to show that it is impotent to effect the very object of its enactment.

But let us apply the Statute with more closeness to this transaction. This judgment is an evidence of a debt due; it is, I admit, the evidence of a debt due upon the primary contract; but what is it under this new arrangement—this subsequent contract? It is an *assurance* of the debt at the time of this subsequent contract, recognized by the parties. It is agreed to be collectible by the plaintiff at the end of a given term of time, and for not collecting it before, the usury is paid. How is this new contract evidenced? By the note given for 15 dollars of usurious interest, and by the judgment. The plaintiff is *assured* in his principal and lawful interest by the judgment, and he takes a note separately for the usury. Now, by the Statute, all *assurances* for the payment of money *to be lent, covenanted or performed upon, or for any usury whereupon or whereby there shall be reserved or taken above the rate of seven per centum per annum, shall be void and of no effect*, except to authorize the recovery of the principal, &c. Does not the Act embrace the transaction? It seems to me that it does. It is within its spirit and its policy, beyond all question; and if so, no rule of the Common Law is applicable to it. The Statute is our guide.

Let the judgment be affirmed.

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No. 6.—SAMUEL B. BARNETT, plaintiff in error, *vs.* JOHN F. TROUTMAN *et al.* defendants.

[1.] In an action against the security of a note, to which the defence was usury: *Held*, that the maker, upon being relieved from all liability, was a competent witness for the defendant.

Certiorari, to Crawford Superior Court. Decided by Judge STARK, at February Term, 1850.

John F. Troutman commenced four actions in a Justice's Court, in Crawford County, against Samuel B. Barnett, upon notes made by one Arthur F. Walker, as principal, and Barnett, as security, to which Barnett pleaded payment and usury.

On the trial before the Jury, having first released him from all liability on account of the notes, Barnett sought to introduce Walker, his principal, as a witness, to establish his pleas. The Justices held that he was incompetent. From this decision, a certiorari was taken to the Superior Court, upon the hearing of which, Judge Stark affirmed the decision of the Justices, and dismissed the certiorari, and counsel for plaintiff in error excepted.

GREENE and CULVERHOUSE, for plaintiff in error.

STRONG and HAMMOND, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] In *Winkler vs. Scudder*, (1 *Kelly*, 108,) this Court held, that the maker of a note, who is released, is a competent witness to prove usury in its consideration, in a suit by an indorsee against an indorser. Here, the action is by the payee against the security. Of course there can be no distinction in principle between the two cases.

In *Starkweather vs. Mathews and others*, (2 *Hill's N. Y. Reps.* 131,) this identical question is decided. The Supreme Court of New York there held, that in an action against the maker of a

note, and his accommodation indorsers, to which the defence was usury, that the former, upon being released from all costs and charges on account of the suit, was a competent witness for the latter.

In the case before us—the maker not being sued, or at any rate, served—we are inclined to think that he was competent, even without a release. If the defence failed, he would be answerable to the security for the amount of the note; and if it prevailed, he would still be liable, as maker to the plaintiff. His interest was balanced. At any rate, there can be no doubt of his competency with the release.

No. 7.—THOMAS A. BREWER, plaintiff in error, vs. JNO. BOWMAN, defendant.

[1.] The Act of 1834, authorizing the Inferior Courts of the several Counties in this State to grant the right of private ways, in certain cases, containing no provision for making any *just compensation* to the owner of the lands, which might be taken for such private ways: *Held*, to be unconstitutional and void.

In Equity, in Bibb Superior Court. Decided by Judge STARK, at Chambers.

John Bowman applied to the Inferior Court of Bibb County, in 1848, in accordance with the Statute of 1834,* to appoint

*An Act to authorize the Justices of the Inferior Courts of the several Counties in this State to grant the right of private ways, in certain cases:

Be it enacted, &c. That from and after the passage of this Act, the Inferior Courts of the several Counties in this State are hereby authorized and empowered, on application, (whenever, in their opinion, it shall seem reasonable and just,) to grant settlement roads or private ways to individuals, to go from and return to his, her or their farm or place of residence

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commissioners to lay out and establish a private way for his use and benefit, from his plantation, on the Ocmulgee river, in said County, to the Forsyth road. The order was granted, and the road established accordingly. Afterwards, Thomas A. Brewer, through whose land the said private road passed, obstructed the same by erecting a gate, thereby preventing its use by Bowman.

Bowman applied to the Superior Court for an injunction to restrain Brewer from obstructing the road, which was granted by Judge Stark.

Upon the coming in of the answer of defendant to complainant's bill, counsel for the defendant moved the Court to dissolve the injunction and dismiss the bill, which motion was overruled by the Court, and defendant, by his counsel, excepted.

MINES and **HALL**, for plaintiff in error.

POWERS and **WHITTLE**, for defendant.

By the Court.—**WARNER**, J. delivering the opinion.

In May, 1848, Bowman obtained an order from the Inferior Court of Bibb County, to establish a settlement or private way, from the Forsyth road to his plantation on the Ocmulgee river.

This road passed over the land of Thos. A. Brewer, who obstructed the use of it by the erection of a gate across it.

SEC. II. Whenever application is made to the Inferior Court by any individual, for a road or way, as aforesaid, it shall be the duty of said Court to appoint three disinterested men in the district where the applicant wishes the road or way to run, whose duty it shall be to go and mark out a suitable road or way, having due regard to the least possible injury to the land through which said road or way is intended to be run, and return to the next Inferior Court, for County purposes, the situation and nature of the case.

SEC. III. When said return is made, it shall be the duty of said Court to grant such order to the applicant as they may think proper; so as to allow to him, her or them, a way to pass out and in from and to his, her or their farm or place of residence.

(The remainder of the Act provides for the punishment of those who may obstruct such road or way.)

Bowman filed a bill of injunction against Brewer, to restrain him from obstructing his road. Brewer answered the bill, and moved the Court to dissolve the injunction, which the Court refused to do; whereupon Brewer excepted, and now assigns the same for error here.

[1.] We distinctly recognize the Common Law principle, urged by the defendant in error, that where A has a tract of land, surrounded by other lands of his own, and he grants the tract of land so surrounded to B, the grantee shall have a right of way to the land granted to him by A, over A's land, as an *incident* to the grant; for otherwise, B could not derive any benefit from the grant. Upon such a statement of facts, B would be entitled to a right of way over the lands of A, from necessity. But the application for the injunction in this case, is not based upon this Common Law principle. The application for the injunction is founded *exclusively* upon the Act of 1834. *Prince*, 742. The question as to the *constitutionality* of that Act, is distinctly made by the record, and is, really, the only question in the case. We have endeavored to give it that consideration and reflection which its importance would seem to require, and the result of our deliberations is, that the Act of 1834, granting the right of private ways over the lands of other persons, without *providing any just compensation*, is in conflict with the fundamental law of the land, and therefore is *unconstitutional*. *Young vs. McKenzie et al.* 3 *Kelly*, 31. *Doe ex dem. Carr vs. The Georgia Rail Road*, 1 *Kelly*, 524. The Act in question makes no provision whatever for compensation to those whose property may be taken for the use of the road, and it has been insisted, that if it did make such provision, still, it would be *unconstitutional*, for the reason, that the private property of one citizen cannot be taken for the private benefit of another, even *with compensation*. According to our land laws, the territory of the State has been divided into small tracts, and granted to the citizens thereof. The land of the complainant is surrounded by the lands of other grantees, or those claiming under the original grantees, so that he cannot reach a public road, without becoming a trespasser. Hundreds of other citizens of the State are, probably, in the same condition.

Now, upon what principle are *public* roads established? The answer is, for the benefit and convenience of the people who may have occasion to travel over them, either to discharge their *public* duties, or to attend to their *private* interest.

But the complainant's land is surrounded by the lands of other proprietors, so that he is excluded from any *public* road; he cannot get out to vote at elections, to perform jury or road duty, to perform either militia or patrol duty, to give evidence in the Courts of Justice, or to carry the productions of his farm to market. If his land contained a valuable coal mine, or other valuable mineral resources, the *public* would be deprived of the benefit of them, for the reason that such resources could not be developed by the owner, and carried to market, without becoming a trespasser. The public, too, have an interest that the lands of each citizen should be cultivated, and the produce thereof be distributed, according to the wants of the people. It would seem, therefore, that to have a private road, as contemplated by the Act of 1834, would not necessarily, in the view in which we have been considering the question, be *exclusively* for the benefit of the party applying for it, but that the *public interest* would also be promoted, by enabling every citizen to perform all the duties which are required of him by law, for the benefit of the whole community.

If it is competent for the Legislature to authorize rail road corporations, to take the property of the citizen for the construction of their roads, on making just compensation therefor, upon the principle that the *public* are benefitted by the construction of such roads, it is difficult to understand why it is not also competent for the Legislature to authorize the granting of private ways, in cases of necessity, upon just compensation being made to the owner of the land which shall be taken for that purpose.

In the former case, the corporation is benefitted by the Legislative grant, and the interest of the public is supposed to result from the construction of the road. So, in the latter case, the individual is benefitted by the Legislative grant of the private road, and the public interest must also be supposed to be advanced, for the reasons already stated, by enabling any citizen to perform all

the duties required of him by law. In the case of the rail road corporation, the Legislature judges of the *necessity* of the *public* interest, to authorize the grant of power to take *private* property for the use of the road; why should not the Legislature also be permitted to judge of the *necessity* of the *public interest*, in granting the power to take *private* property for private roads, upon just compensation being made therefor?

In *Taylor vs. Porter*, (4 *Hill's N. Y. Rep.* 140,) it was held by the majority of the Court, that private property could not be taken for a private road, even *with compensation*, and that an Act of the Legislature, granting the power to establish such road, was unconstitutional and void. In Pennsylvania, it has been held that the Legislature may authorize the laying out of private ways, for the purpose of enabling citizens to reach the public roads. *Harvey vs. Thomas*, 10 *Watt's Rep.* 63.

In *Buckman vs. The Saratoga Schenectady Rail Road Co.* (3 *Paige's Rep.* 73,) Chancellor *Walworth* states the doctrine upon this subject to be, that "if the *public interest* can be *in any way promoted* by the taking of private property, it must rest in the *wisdom* of the Legislature to determine whether the benefit to the *public* will be of sufficient importance to render it expedient for them to exercise the right of *eminent domain*, and to authorize an interference with the private rights of individuals for that purpose." See also *Commonwealth vs. Breed*, 4 *Pickering's Rep.* 463.

We have endeavored to show that the establishment of private roads, by the authority of the Legislature, is not *exclusively* for the benefit of the individuals upon whose application they may be so established, but that the *public* are also interested in every citizen having a right of way to and from his lands or residence. If we are right in this view of the question, then it would follow that if the Act of 1834 had made provision for compensation for the land taken for the right of way, the Act would have been constitutional.

This view of the question is strengthened by the consideration that the State of Georgia never could have intended to have granted any portion of her lands to her citizens, and that such grantees, or the assignees of such grantees, should be prevented

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from having the right of way over such granted lands, to perform all the *public* duties which her laws require. But inasmuch as the Act of 1834 makes no provision, whatever, for any *just compensation* to the owner of the land over which the private road may be laid out, we feel constrained, in accordance with the principles settled by this Court, in *Young vs. McKinzie et al.* and in *Doe, ex dem. Carr vs. The Georgia Rail Road Co.* to adjudge that Act to be unconstitutional and void.

Let the judgment of the Court below be reversed.

No. 8.—WILLIAM F. MAPP and another, plaintiffs in error, *vs.*
JOHN F. THOMPSON, defendant.

- [1.] In an action on a forthcoming bond, given by a claimant, a plea of tender of the property, levied on after the day of sale, is bad. The bond is forfeited by a failure to deliver the property at the time and place of sale, and no subsequent act of the obligors can relieve them from such forfeiture.
- [2.] To charge the obligors on a delivery bond, it is necessary that they should be notified of the time and place of sale, and a legal advertisement of such sale is sufficient notice.
- [3.] When, by a special Act, the Sheriff is authorized to advertise his sales in a paper published in the County, it is not necessary to advertise the sales for that County, at three of the most public places in the County, to make the advertisement legal.
- [4.] Anything done or said by the plaintiff in execution, which will amount to a waiver of the obligation to deliver the property at the time and place of sale, is a good defence to an action on the bond.

Debt on forthcoming bond, in Monroe Superior Court. Tried before Judge STARK, March Term, 1850.

Two slaves were levied upon by the Sheriff of Monroe County, by virtue of a *fi. fa.* in favor of John F. Thompson, the defendant in error, against Elihu Price and Alexander Russell, as

the property of the latter, which were claimed by William F. Mapp, who executed a bond for the forthcoming and delivery of the negroes to the Sheriff at the time and place of holding Sheriff's sales in the County of Monroe. The claim was subsequently dismissed, and Mapp neglected to deliver the negroes to the Sheriff, according to the terms and condition of the forthcoming bond. Upon this bond, Thompson, the defendant in error, instituted his action of debt; to which the defendants pleaded a tender of the negroes to the Sheriff, subsequent to the day on which they were advertised; by the Sheriff, to be sold.

On the trial of the cause, counsel for the plaintiff moved the Court to strike the defendants' plea, which motion was sustained by the Court, and counsel for defendant excepted. Counsel for the defendant moved to nonsuit the plaintiff, because the Sheriff had not advertised said sale according to law, having neglected to give notice of the same at three of the most public places in the County, as well as in the "Little Georgian," a public gazette, published in the County of Monroe, and in the Town of Forsyth; which motion was refused by the Court, and counsel for defendant excepted.

And upon these exceptions has assigned error.

PINCKARD and HAMMOND, for plaintiffs in error.

HARMAN, and POWERS & WHITTLE, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] By the Act of 1811, where property is levied upon and claimed, the claimant is entitled to its possession, upon giving bond and security in *treble* the amount of the execution levied, for the delivery of the property at the time of sale, (provided the property levied on should be found subject to the execution,) and in case the claimant should fail to deliver it *at the time and place of sale, agreeably to the terms of the bond*, it is made the duty of the officer taking, to transfer the bond to the plaintiff in execution; and the law declares that it shall then be recovera-

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ble in any Court of Law or Equity in this State, having cognizance thereof. By the Act of 1841, these forthcoming bonds are taken in *double* the value of the property levied on, and are made payable to the plaintiff in execution, instead of the levying officer, who is authorized to sue and recover thereon, upon breach of the condition. *Prince*, 438. *Act of 1841, pamph. p. 128.*

The action in this case was brought by a plaintiff in execution, upon a bond taken under these Statutes. It is against the principal in the bond and his surety. The execution levied was founded on a joint judgment against Price and Russell, and the property was levied on as the property of Russell. Mapp put in a claim, and gave bond, with Jordan his surety. The bond recites the execution and the levy, and describes the property. The condition is in the following words: "Now, if the said William F. Mapp *shall have the property so levied on at the place and time of sale*, when required by the Sheriff for that purpose, in the event the same should be found subject to said execution, then the said bond to be void, else to remain in full force." The words in the condition of the bond, *when required by the Sheriff for that purpose*, were held by this Court to impose no additional duty on the Sheriff. 6 *Geo. R.* 262. They are not, therefore, to be regarded, in this discussion, as meaning anything; indeed, nothing was claimed, on their account, in the argument. To the action, the defendants pleaded a tender of the negroes levied on to the Sheriff, subsequent to the day on which they were advertised to be sold. The Court, upon motion, ordered the plea to be stricken, as insufficient. Whether this order was according to law, is the first and main question made in the record. If the obligors in the bond could discharge themselves by a tender of the property after the day of sale, the plea is good, and not otherwise. This question depends upon the question, whether or not the bond is forfeited by a failure to deliver the property at the time and place of sale? If it was forfeited by such failure, the defendants could not relieve themselves from the consequences of the forfeiture by a subsequent tender. This is manifest from a consideration of the rights of the plaintiff in execution, (the obligee in the bond,) and the obligations which de-

volve upon the obligors. The right of the plaintiff is determined by the Act of 1841, which declares that he may sue and recover thereon, upon a breach of the condition. The obligation of the obligors is, to pay the debt when the conditions are broken; that is, when the forfeiture takes place. These rights accrue at the time of forfeiture; so also the obligation. They are *fixed at that time by law*, and it is clear that no act of the obligors afterwards can repeal the law and revoke the rights and cancel the obligation. It has been held, by highly respectable Courts, that a forthcoming bond is to be regarded, after forfeiture, as a substitute for the judgment, and is, in fact, a satisfaction of the judgment upon which the execution levied issues, and that no farther proceedings can be had under it; the plaintiff in execution being remitted to and concluded by his remedies on the bond. Ch. J. *Marshall*, in *The United States vs. Graves et al.* whilst he held that the bond arrested all farther proceedings on the judgment, doubted whether it extinguished the original claim. 2 *Brock*. 385, '6. *Cook vs. Piles*, 2 *Munford*, 153. *Rusk vs. Ramsey*, 3 *Ibid*, 454. See, also, *Taylor vs. Dundas*, 1 *Wash.* 92. 2 *Ibid*, 189. *Jett vs. Walker*, 1 *Rand.* 211. *McCombs vs. Ellett*, 8 *S. & M.* 505. *Ibid*, 613. 7 *Ibid*, 791. *Walker's R.* 175. *Ibid*, 251.

There are, clearly, cases where the bond, after forfeiture, does not extinguish the original claim. For example, a judgment is rendered against a surety alone, and a levy made, and he gives the forthcoming bond, which is forfeited; in such case, it cannot be that the forfeiture of the bond extinguishes the right of the creditor to go against the principal in the debt, upon the original contract. So decided in *Randolph's Executrix vs. Randolph*, 3 *Rand.* 490. So, when there is a joint judgment against two, and a levy and bond by one, the forfeiture of the bond will not extinguish the judgment against the other judgment debtor. So decided in *Robinson vs. Sherman*, 2 *Gratt.* 178. See, also, *Lake vs. Ferguson*, 2 *Gratt.* 419. The decided cases here referred to, are upon forthcoming bonds, made by the defendant in execution. I apprehend the principles are the same, in cases of claim and bond by the claimant, under our Statute.

Without entering farther into these questions, we are prepared to say, that the effect of the forfeiture of the bond in this case is, to arrest all farther proceedings on this judgment, against the defendant in execution, whose property was levied on, and that the property levied on is forever discharged from the lien of the judgment. The Sheriff, too, is discharged from the liability which the levy devolves upon him, ordinarily, by the giving of the bond; for the Statute makes it his duty to receive it, and when given, to deliver the property to the claimant. These considerations are adduced to show how vitally the rights of the plaintiff in execution are affected by the forfeiture of the bond, and thence to draw the inference that no act of the obligor, after its forfeiture, can relieve him from the consequences of the forfeiture. I return now to the enquiry—what constitutes a breach of the condition of this bond? In other words, when is it forfeited? We find no difficulty in saying, that if the property is not delivered at the time and place of sale, when and at which it is advertised to be sold, the condition is broken, and the bond is forfeited. The reasons for this conclusion are—

1st. The Statute so declares; for it does declare, that if the claimant or his surety shall fail to deliver the property at the time and place of sale, agreeably to the bond, the said bond shall be recoverable in any Court of Law or Equity in this State, having cognisance thereof. The bond, too, is required by the Statute to be given agreeably to such condition, for it is to be taken for the *delivery of the property at the time of sale*. The declaration of the Act, that upon the condition prescribed, the bond *shall be recoverable, &c.* is a declaration, that upon that condition it is forfeited, for the right of recovery is wholly incompatible with the idea of non-forfeiture.

2d. Because such is the contract of the parties, and by that contract they are bound. The obligors stipulate, that if they shall not have the property levied on, at the time and place of sale, the bond shall be in full force and effect, and the obligee stipulates, that if it is delivered at the time and place of sale, the bond shall be null and void. Such is the agreement. Upon failure to comply with this obligation, the obligors become liable to the

obligee upon their contract; that is, they then violate their contract; the bond is broken at the time and place of sale, and then and there it is forfeited. Upon similar bonds in other States, the same decision has been made. *Poteet vs. Bryson*, 7 Iredell, 337. *Minor vs. Lancashire*, 4 How. Miss. R. 347. *English vs. Fenicy*, 5 Blackf. 298. 4 Dev. 424. 2 Ham. 297. 3 Rand. 554. 1 Wash. 273, 162.

There is no error, therefore, in ruling out the defendant's plea, and upon that assignment, the judgment of the Court below is affirmed.

[2.] These things being so, it was contended before the Court below, that the defendants are not liable on their bonds, because there was no legal advertisement of the property for sale; that is, that they had no legal notice of the time and place of the sale, and was not, for that reason, guilty of a breach of the bond, in not delivering the property at that time and place. They moved for a nonsuit on this ground, and the presiding Judge refusing to grant it, they excepted. The facts are, that the property was advertised for sale in the *Little Georgian*, a paper published in the County, but was not advertised in three of the most public places in the County. The argument is, that the law requires the Sheriff's sales to be advertised in one of the public gazettes of the State, and also at three of the most public places in the County. This sale was not advertised in three of the most public places in the County; therefore, the defendants had no legal notice, because this advertisement was not according to law. It is conceded that the defendants must be notified of the time and place of sale. If not, they are not liable. Express notice in any form would do, as we think, but the plaintiff is not held to prove express notice. If the property was legally advertised for sale, it is presumed that the defendants had notice. All, as we think, the plaintiff is bound to prove is, that it was so advertised.

[3.] The question then is, was the advertisement in this case a legal advertisement? The general law is, as claimed by the plaintiff in error, the Judiciary Act of 1799, requires that notice of Sheriff's sales shall be given in one of the public gazettes

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of the State, and shall also be advertised in three of the most public places in the County. *Prince*, 427. The reason of this last requirement is obvious. It is to insure general notice, in order that the property might be brought fairly into market, and command its full value. Publication at three of the most public places in the County, was, in 1799, believed to be indispensable to give thorough notice of the sale. Then, there were comparatively few gazettes published in the State, and they at remote points from many of the Counties, and had but a limited circulation. The requirement, then, was a reasonable one. The reason of the law, in that regard, has, it must be admitted, to a great extent, ceased. Now newspapers are numerous and, particularly those in which Sheriff's sales are advertised, have a very extensive circulation. Now, almost every citizen either takes or has access to a newspaper. The law which requires sales to be advertised at three of the most public places in the County, has grown into disuse, and there is strength in the argument, that it is obsolete. To hold it necessary, would be to destroy the title to a vast amount of property in this State. We, however, do not decide now that it is obsolete. In this case it is not necessary. The Sheriff's sales in the County of Monroe are advertised, by a special Act, in the paper published at Forsyth, in that County. That special Act does not require that they shall be also advertised at three of the most public places in that County. If the advertisement was in accordance with the requirements of that special Act, it is, in our judgment, a legal advertisement. The special law for Monroe County must be considered as repealing the general law, so far as that County is concerned. There is no pretence but that the advertisement, in this case, was in accordance with that special Act. We therefore hold that it was legal, and that the defendants had notice of the time and place of the sale, and affirm the judgment on this head also.

[4.] If the failure to deliver the property at the time and place of the sale, was on account of anything said or done by the plaintiff, amounting to a waiver of that obligation, it would be a good defence to the action. The defendants had the benefit of this

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position before the Jury, for the Court gave it in charge to them.

Other grounds of error are taken in the assignment and bill, upon none of which could we send the case back. And as the points now ruled control this cause, we do not consider that they require a more particular notice.

Judgment affirmed.

No. 9.—ROWAN SPICER, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

- [1.] It is no plea for a surety, that a bond was obtained by duress.
- [2.] Bail is usually *absolute* in the first instance; still, if the Magistrate has been deceived, or taken insufficient bail, he may require fresh sureties. To entitle the sureties in the *second* bond to their discharge, they must aver, in their plea, that the first bond was good and sufficient. Is this a good plea to the second bond? *Quere.*
- [3.] A recital in the judgment of forfeiture, that the principal and bail were called in open Court, and did not appear in terms of their undertaking, is sufficient.
- [4.] The judgment of forfeiture need not specify the amount of the bond.

Scire facias, in Monroe Superior Court. Tried before Judge STARK, March Term, 1850.

On the third day of April, 1847, William Spicer, at that time the Jailor of Monroe County, was arrested "for aiding in the escape of Josiah Hudgins from the common jail of said County, convicted and under sentence of death for murder." He was brought before Benjamin King and Jonathan Johnston, Justices of the Peace in and for said County, and entered into a bond in the sum of \$800, with Rowan Spicer as security, for his appearance before the Superior Court of said County, at the September Term following, to answer to said charge.

Spicer vs. The State of Georgia.

At March Term, 1848, the following judgment nisi was taken and entered of record :

STATE OF GEORGIA	}	<i>Bond to appear, &c.</i>
vs.		
WILLIAM SPICER,		
ROWAN SPICER,		

It appearing to the Court, that when the aforesaid cause was called in open Court, the aforesaid William Spicer was three times called, and required to appear in Court and defend his cause, and he having failed so to do, and the said Rowan Spicer, security for William Spicer upon said bond, having been likewise three times called and required to produce the body of his principal, and he having failed so to do: whereupon it is ordered, considered and adjudged by the Court, that said bond be forfeited to the State of Georgia, and that the Clerk of the said Court issue *scire facias*, in the terms of the law, requiring the said William and Rowan Spicer to be and appear at the next Superior Court of said County, to show cause, if any they have, why final judgment should not be taken on said bond, for the amount of the same, as well as cost," &c.

On the 14th day of August, 1848, a *scire facias* was issued against the defendants, returnable to the September Term of said Court, 1848, calling upon the defendants to show cause why judgment should not be taken upon their bond. The judgment nisi and the bond were recited in said *scire facias*.

To this action, the defendant, Rowan Spicer, by his counsel pleaded specially, in substance, as follows: "That plaintiff ought not to maintain his action against the defendant, because the said bond was unlawfully taken of this defendant, in this, that the said William Spicer, was, on the 18th day of March, 1847, required to enter into bond before the same Justices of the Peace, for his appearance before the Superior Court of said County, at September Term, 1847, to answer for the offence of aiding Hudgins to escape from the common jail of said County, and that the said William did enter into such bond in the sum of \$800 with Josiah Spicer, John W. Thomaston and B. M. Bentley, as

his securities, who then and there justified, upon demand of the prosecution and order of said Justices; that afterwards, to wit: on the 30th day of April, 1847, the said William Spicer was again arrested for the offence of permitting said Hudgins to escape from jail, whilst he, the said William, was keeper thereof; that, whilst under said second arrest, for the offence last aforesaid, the said William was required to give another bond, conditioned to answer at the Superior Court for the offence first aforesaid, and did accordingly execute the bond sued on, and gave the defendant, Rowan Spicer, as his security; which last bond, defendant alleged, was void and inoperative, because the Justices had no authority to require it, and no investigation being had before them, as to the sufficiency of the first bond given.

On the trial of the cause, counsel for defendant moved the Court to strike defendant's plea, which motion was granted, and the plea ordered to be stricken, and the defendant excepted.

The plaintiff submitted in evidence the bond of William and Rowan Spicer, and then tendered the judgment *nisi*; to the introduction of which, counsel for defendant excepted. The Court overruled the objection, and the judgment *nisi* was admitted in evidence, and counsel for defendant excepted, and on these several exceptions has assigned the following errors in the rulings and decisions of the Court below:

1st. That the Court erred in striking out the plea of the defendant.

2d. The Court erred in admitting in evidence the bond and judgment of forfeiture, (so called,) because there was no record showing that William Spicer, the principal, was called and did not appear.

3d. The Court erred in admitting in evidence the above bond and judgment, because it was not a sufficient judgment of forfeiture.

1st. Because there was no recital or statement of a bond having been given, nor what was the foundation of said bond.

2d. Because the said judgment was void for uncertainty—the said judgment being for no amount, and in such general terms, that no judgment absolute could be rendered upon it.

POE and TRIPPE, for plaintiff in error.

Sol. Gen. McCUNE, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] This is a proceeding by *scire facias* upon a bond to answer to a criminal prosecution. The bail only was served. He pleaded specially to the action, to the effect that his principal had already given bond for his appearance. A demurrer to the plea was interposed and sustained, and this constitutes the first ground of complaint in the bill of exceptions. It is alleged in the plea, and by the demurrer admitted to be true, that William Spicer, the principal, was arrested and brought before the committing Magistrates, for the offence of aiding in the escape of one Josiah Hudgins from the jail of which he, Spicer, was the keeper. And that he gave bond to answer to the charge; that some short time thereafter, another warrant was issued against him, for the offence of *permitting* the prisoner, while in his custody as Jailor, to escape; that while under this second arrest, he executed the obligation, which is the foundation of this action, and that he was discharged by the Justices. But the plea does not allege that the giving of this *second* bond by Wm. Spicer, was the condition of his discharge. Even if it did, it would constitute, we apprehend, no sufficient defence for the bail, who acted voluntarily in the premises. *Cro. C. C.* 16..

[2.] The plea is defective in another particular; it does not aver, except argumentatively, that the *first bond* taken was good and sufficient in law. It states that the securities *justified* upon being required to do so, and that no proof was produced to the Court of Inquiry, and no investigation had as to the sufficiency of this *first bond*; whereas, it should have affirmed, positively, that it was sufficient. Ordinarily, bail is absolute in the first instance; but if the magistrate be deceived, he may require fresh sureties. *Hawk. b. 2, c. 15.*

[3.] It is objected, that no judgment can be rendered upon the

scire facias—1st. Because there was no record, showing that William Spicer, the principal, was called and did not appear. 2d. Because the previous judgment of forfeiture was void for uncertainty ; the same being for no amount, and in such general terms, that no final judgment can be rendered on it.

This Court, in *Park vs. The State*, (4 *Kelly & Cobb*,) held, that the record must show a judgment of forfeiture ; and this fact is fully evidenced by this record. It recites, that William Spicer was called in open Court three times, and required to appear and defend his case, and that Rowan Spicer, the defendant, was called and required to produce the body of his principal, which he failed to do ; whereupon, their bond was declared to be forfeited, and the Clerk was ordered to issue a *scire facias* thereon, in terms of the law.

By the Act of 1831, (*Prince*, 470,) it is provided that, whenever any person shall enter into any bond for the appearance of another to answer for any offence committed against the laws of the State, and shall fail to produce the body of his principal at Court, according to the tenor and effect of the bond, when required to do so, that it shall be the duty of the Solicitor General or prosecuting officer to forfeit said bond in the manner heretofore practiced in this State.

[4.] It is apparent, from the record before us, that all this has been done in this case. Counsel for the plaintiff in error, assuming the Common Law doctrine, as contained in *Tidd*, p. 1091, and other works of practice, that a *scire facias* is founded on a *record*, and consequently, must be restricted to it, insist that, inasmuch as the judgment of forfeiture does not set forth the amount of the bond, there can be no recovery. The answer to this is, that by the Statute which I have just recited, the Clerk is directed to issue the *scire facias* upon the *bond*, and that admitting the omission in the judgment of forfeiture to recite the amount of the bond to be fatal, by the English practice, still, it is fully obviated by our own legislation.

Upon all the grounds, then, taken in the bill of exceptions, the judgment below must be affirmed.

Rutherford v. The Executive Committee Baptist Convention of Georgia.

No. 10.—WILLIAMS RUTHERFORD, Sr. plaintiff in error, vs. THE EXECUTIVE COMMITTEE OF THE BAPTIST CONVENTION OF THE STATE OF GEORGIA, for the benefit of the Mercer University.

[1.] An instrument, under the hand and seal of the party executing it, imports a consideration in law, and a demurrer to the admissibility of such an instrument in evidence, for *want of consideration*, will be overruled.

Debt, in Monroe Superior Court. Tried before Judge STARK, March Term, 1850.

The defendant in error brought an action of debt against the plaintiff in error, upon the following instrument: "In consideration of the importance of literary and religious institutions to the wellbeing of society, I hereby promise to pay to the treasurer of the Georgia Baptist Convention, or bearer, for the benefit of the Mercer University, the following sums, to-wit: Fifty dollars on the 1st of January, 1839; fifty dollars on the 1st of January, 1840; fifty dollars on the 1st of January, 1841; fifty dollars on the 1st of January, 1842; fifty dollars on the 1st of January, 1843; for the faithful payment of which sums, I hereby bind myself, my heirs and assigns." Witness my hand and seal, this 3d day of April, 1838.

Signed

WILLIAMS RUTHERFORD, [L. S.]

The two first instalments had been paid by the defendant.

To this action, the defendant filed the plea of the want of consideration. On the trial of the cause, the counsel for defendant objected to plaintiff's giving in evidence the instrument sued on, "on the ground that the paper, on its face, was void as a contract at law, for want of a legal consideration to support it."

The Court overruled the objection, and counsel for defendant excepted.

HAMMOND, for plaintiff in error.

PINCKARD, for defendant in error.

By the Court.—**WARNER**, J. delivering the opinion.

[1.] The defendant in the Court below demurred to the instrument declared on, when offered in evidence, upon the ground that it was void as a contract in law, for want of a *legal consideration* to support it. The Court overruled the demurrer, and the defendant excepted, and now assigns the same for error here.

The instrument set forth in the record is executed under the hand and seal of the defendant, and necessarily imports a consideration. In the case of a *specialty*, no consideration is necessary to give it validity, even in a Court of Equity. *Chitty on Contracts*, page 2. *Chitty on Bills*, 8. *Fallowes vs. Taylor*, 7 *Term Rep.* 473. But it is said this rule is merely *technical*. Admit it to be so, yet, we have no disposition to alter it, even had we the power to aid this defendant in making, what appears to us on the face of this record, to be an unjust defence against the payment of the plaintiff's demand.

Let the judgment of the Court below be affirmed.

No. 11.—**FRANCIS SORRELL**, executor of John B. Gaudry, plaintiff in error, *vs.* **MILTON M. HAM** and **STEPHEN R. HAM**, defendants in error.

[1.] An executor may bring ejectment to recover lands, but his right to recover depends upon the will; and that must be produced as part of his title.

[2.] A grant, in letters testamentary, of power to administer the goods and chattels, rights and credits of the testator, gives authority to administer the will also as to real estate.

Ejectment, in Houston Superior Court. Tried before Judge **STARK**, April Term, 1850.

This was an action of ejectment, brought by the plaintiff in error against the defendant, under the Act of 1847, for the recovery of a tract of land lying in Houston County, and mesne profits.

On the trial in the Court below, the plaintiff introduced in evidence a grant from the State of Georgia to James Gould, and a deed from Gould to John B. Gaudry. The plaintiff then read in evidence his letters testamentary, as follows :—

GEORGIA :

By the Honorable the Court of Ordinary, for the County of Chatham, in the State aforesaid. To all to whom these presents shall come, greeting ; Know ye, that on the eleventh day of January, in the year of our Lord, one thousand, eight hundred and forty-seven, the last will and testament of John B. Gaudry, late of said County, in this State, merchant, deceased, was proved, approved and allowed of ; the said deceased having, whilst he lived, and at the time of his death, been possessed of divers goods, chattels and credits, within the County and State aforesaid, by means whereof the approbation and allowing of his testament, and the power of granting the administration of all and singular, the goods, chattels and credits of the said deceased, to this Court, is manifestly known to belong ; and that the administration of all and singular the goods, chattels and credits of the said deceased, and of his testament, any manner of way concerning, is hereby granted and committed unto Francis Sorrell, named executor in the said last will and testament, being first sworn on the holy Evangelist of Almighty God, well and faithfully to administer, and make a full and perfect inventory of all and singular, the goods, chattels and credits of the said deceased, and to exhibit the same into the Clerk of the Court of Ordinary's office, of the said County, in order to be recorded on or before the thirteenth day of April next ensuing, and to render a just and true account, calculation and reckoning thereof, when thereunto required.

Witness, the Honorable Anthony Porter, one of the said Justices, this the 13th day of January, 1847.

SEABORN GOODALL, C. C. O. C. C. [L. S.]

The plaintiff proved the *locus* and possession of the defendants, and the value of rent, and closed his case.

Counsel for the defendants moved the Court for a non suit.

Which motion was sustained by the Court, and a non-suit was awarded, "for the reason that these letters testamentary only gave the executor power over the "goods and chattels," "rights and credits," and this action, not being for the recovery of a term or other chattel interest, but being an action for the recovery of real estate and mesne profits.

To which decision, counsel for plaintiff excepted, and has assigned error.

POE and NISBET, for plaintiff in error.

GILES, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] The plaintiff brought his action of ejectment for the recovery of land, as executor of the last will and testament of John B. Gaudry. It was non-suited, on the ground that the plaintiff's letters testamentary only gave him power over the goods and chattels, rights and credits of the testator, and therefore, he could not recover lands. Whilst we sustain the judgment of the Court, we do not sanction two propositions which seem to have been ruled by the Court. The first is, that the executor cannot bring ejectment for lands. We hold that he can, but that his right to recover, depends upon the will. The right of recovery will depend upon the fact, whether the lands have been bequeathed at all or not—they may not be. In that event, no right of action passes to the executor, and it may depend upon the character of the bequest of lands in the will. The will is, therefore, an indispensable part of his title, and must be produced on the trial. It was not produced, and for that reason we hold that the plaintiff was necessarily non-suited. On this ground alone, the judgment is affirmed.

[2.] The other proposition is, that the plaintiff is not entitled to recover lands, because the letters empower him to administer

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only the *goods and chattels, rights and credits* of the deceased. It is not necessary, to enable the executor to administer the real estate, that there should be an express grant of power to that effect in the letters. It would be better that they contain such a grant; but under our laws, the right to execute the will, both as to *personalty* and *realty*, follows in the general grant of power to administer the goods and chattels, rights and credits. *Prince's Dig.* 225, 233, 241. 1 *Kelly*, 540. 3 *Kelly*, 105.

Judgment affirmed.

No. 12.—WILLIAM TERRELL, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1.] It appearing, from the statement in the face of the indictment, that the Grand Jury were sworn, it is not competent, *on a motion in arrest of judgment*, to disprove the recital by *aliunde* testimony.

Indictment for murder. Tried before Judge HILL, at March Term, 1850.

At the September Term, 1848, of DeKalb Superior Court, a true bill for murder was found and returned by the Grand Jury against William Terrell, the plaintiff in error. At March Term, 1850, the defendant was put upon his trial, and the Jury returned a verdict of voluntary manslaughter.

The defendant, by his counsel, moved to arrest the judgment of the Court on two grounds :

1st. Because the prisoner was not charged in the bill of indictment with having committed the offence of murder *UNLAWFULLY*.

2d. Because the name of *Patterson M. Hodge* appeared as a Grand Juror in the bill of indictment, and it no where appeared, on

the records of said Court, that said *Patterson* M. Hodge was sworn as a Grand Juror at that term of the Court, and that it appeared, from the certificate of the Clerk of said Court, that he was not sworn as a Grand Juror at said term of the Court.

It appeared, from the certificate of the Clerk of the Court, that *Patrick* M. Hodge was sworn as one of the Grand Jury, at the term of the Court the said bill of indictment was found, to wit: September Term, 1848.

The Court overruled the motion in arrest of judgment, and counsel for defendant excepted, and assigned error upon the second ground only.

A. H. H. DAWSON, for plaintiff in error.

Sol. Gen. TIDWELL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We do not find it necessary to express any opinion upon the merits of the objection taken to this proceeding. We are willing to concede, that it would have been valid if taken at the proper time and in the right way; for no man shall be held to answer for any capital or infamous offence, until he shall have been first charged with the same by a Grand Jury of the County, who have taken the oath prescribed to them by law. But was it good in arrest of judgment? We think not.

We understand that nothing is good in arrest of judgment, which does not arise from *intrinsic* causes appearing upon the face of the record. The record of this case commences with the bill, and on the face of the indictment, it is stated that the Grand Juror, *Patterson* M. Hodge, was sworn. To controvert this recital, and to show that the Juror was not sworn, recourse is had to the minutes of the Court, at the beginning of the term, and to the certificate of the Clerk, neither of which are admissible upon such a motion. The defendant, to take advantage of this irregularity, should have pleaded it specially in bar, upon the arraignment, (*Prince*, 660,) and before proceeding to trial.

Wormack vs. Rogers and Pullen.

I would not say that it would not be ground for a new trial, had the fact come to the knowledge of the defendant too late to make it available in any other way.

No. 13.—SHERWOOD R. WORMACK, plaintiff in error, vs. SARAH L. ROGERS and WILLIAM A. PULLEN, administrators, &c. *et al.* defendants.

[1.] Inadequacy of price, as a general proposition, will not, *per se*, be a sufficient ground to set aside a conveyance in a Court of Equity; yet, that circumstance, taken in connexion with others of a suspicious nature, may afford such a vehement presumption of fraud, as will authorize the Court to set it aside.

In Equity, in Troup Superior Court. Decision on demurrer, by Judge HILL, May Term, 1850.

Sarah L. Rogers and William A. Pullen filed their bill, returnable to the Superior Court of Troup County, alleging, that in the year 1848, Henry A. Rogers, of said County, died intestate, leaving Sarah L. Rogers and his sister, Lucretia Jane, then the wife of Pullen, his only heirs at law surviving; that before the death of the said Henry A. Rogers, to wit: in the year 1845, Collen Rogers, the father of Henry A. Rogers, died, leaving Sarah L. the said Henry A. and the said Lucretia Jane, his heirs at law, surviving; that previous to his death, he executed his last will and testament, bequeathing his entire estate, after the payment of his debts, to be distributed amongst his said heirs; that after the payment of his debts, amongst his property to be distributed, were twenty-six negroes, to-wit: George, Gift, Beverly, Peggy and her eight children, Elendor and four children, Mariah and her two children, Nancy and her four children, and Enoch, a boy,

in which the said Henry A. Rogers would have been entitled to an undivided interest, it being one-third part thereof.

The bill alleges, that on the 5th day of January, 1848, a short time after the arrival at legal age of the said Henry A. Rogers, and while his said undivided interest in his father's estate was yet in the hands of Thomas B. Greenwood, his executor, and the prospect of his recovering, remote and uncertain, on account of the demands in suit and then pending, by and against the said Greenwood, as executor, and the said Henry A. being of improvident and extravagant habits, and pressed by his creditors with judgments, on some of which he was threatened with *cas.* and being indebted, in some small amount to Sherwood R. Wormack, of said County of Troup, he was induced, by the said Wormack, to transfer and assign to the said Wormack the whole of his undivided interest in the said negroes ; that the price paid by the said Wormack was wholly inadequate and disproportioned to the value of the interest so conveyed.

The bill charged, that the said Henry A. Rogers was overreached and defrauded by the said Wormack in making said transfer, who was the uncle of the said Henry A. and in whom he reposed great confidence.

The bill charged, that some years before Henry A. Rogers came of age, Wormack, taking advantage of his youth and inexperience, procured from him, for some inadequate consideration, a bill of sale for one of said negroes, to wit : Beverly, long before the said estate was ready for distribution, and while it was in the hands of the executor for settlement, which said negro, the said executor, for several years after the execution of said bill of sale, hired out, at public outcry, and the said Wormack influenced the said Henry A. Rogers, after each year's hiring, to give his note for the amount for which the said negro hired ; that the notes so given formed a large part of the consideration for the conveyance of his interest in his father's estate, executed by Henry A. Rogers to the said Wormack ; that another item in said consideration consisted of a note made by Henry A. Sarah L. and Lucretia Jane, for one hundred and seventy-five dollars, which note was not delivered up to the said Henry

A. Rogers, according to agreement, or if delivered up, was afterwards fraudulently obtained by the said Wormack, and after the death of the said Henry A. traded by him to one James Beeland.

The bill charged, that complainants did not believe the said Wormack paid to the said Henry A. more than three hundred dollars for his interest in the negroes, and that said interest had recently been partitioned, and by the partitioners valued at thirty-eight hundred and seventy dollars.

The bill alleged, that after the death of Henry A. Rogers, to wit: in the year 1848, Lucretia Jane, the wife of Pullen, died, and that he had been appointed administrator on her estate.

That Wormack, as assignee of Henry A. Rogers, had heretofore commenced and was prosecuting his suit in Equity against Greenwood, executor of Collen Rogers, for his said interest in the negroes, and also against William A. Pullen, one of the complainants, as administrator of Henry A. Rogers, to prevent him from recovering and taking possession of the said Henry A.'s share of the said negroes.

The bill charged, that complainant had offered and still offers to account to Wormack for the amount which was justly due him from the estate of the said Henry A. Rogers, so soon as the same can be ascertained and duly administered upon. The bill prayed that Wormack might be enjoined from proceeding in his suit against Greenwood, as executor of Collen Rogers; and complainant, as administrator of Henry A. Rogers; also, that he might be perpetually enjoined from any further proceedings at Law or in Equity, for the recovery of the said negroes, and Sherwood enjoined from delivering or accounting to him for the same; also, that the said Sherwood, as executor, &c. should be decreed to account with and deliver to complainant, as administrator of Henry A. Rogers, the said share in the said negroes, to be duly administered for the benefit of complainants and the creditors of Henry A. Rogers.

To this bill, the defendant filed a general demurrer for want of Equity.

Upon the hearing of which, the Court overruled the demurrer, and this decision is assigned as error.

STEPHENS, for plaintiff in error.

BULL, for defendants in error.

By the Court.—WARNER, J. delivering the opinion.

Does the bill of the complainants make such a case as will entitle them to relief in a Court of Equity?

[1.] The conveyance sought to be set aside, was made by Henry A. Rogers to Wormack of a vested interest in the estate of his deceased father. What the *amount* of that estate would be, after the payment of the debts or the time of its enjoyment *in possession*, was *uncertain*. Wormack, who was the uncle of Rogers, in whom he had *great confidence*, first procures a bill of sale from him of one of the negroes, to which, at that time, Rogers had no legal title. This pretended purchase took place some years before Rogers became of age; this negro was in the possession of his father's executors, and was annually hired out by them. Wormack influenced young Rogers to execute to him a note, each year, for the amount for which this negro was annually hired by the executors. It also appears that Henry A. Rogers was a profligate and extravagant young man in his habits; was pressed with debts by his creditors, some of which were in judgment, and threatened with *ca. sas*. Under these circumstances, Wormack procured from Rogers an assignment of all his interest in his deceased father's estate, which has since been settled in the due course of administration, and the interest of each legatee ascertained and set apart—the share of Henry A. Rogers being of the value of thirty-eight hundred and seventy dollars. The complainants also charge, that the defendant did not actually pay more for this interest of Henry A. Rogers in his deceased father's estate, than three hundred dollars. This is not an application to set aside this conveyance, on the part of the administrators of Henry A. Rogers, for the benefit of *his creditors*. The

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application is made by the legal representatives of Henry A. Rogers, to have this conveyance set aside for their own benefit, as we understand the question. Inadequacy of consideration, as a general proposition, is not, *per se*, a sufficient ground to set aside this conveyance, although, as was remarked by Lord Thurlow, in *Gwynne vs. Heaton*, (1 *Brown's Ch. Rep.* 9,) the inadequacy of the price paid, compared to the value of the property purchased, "is so gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the *inequality* of it." While we do not place our judgment *exclusively* upon the ground of the *inadequacy* of the consideration, yet, *that circumstance*, taken in connexion with the *other facts* charged in the bill, furnishes the most vehement presumption of *fraud*. The young man was extravagant and profligate in his habits; was pressed by his judgment creditors; the defendant was his uncle, in whom he had *great confidence*; he exhibited claims, for the hire of the negro, Beverly, against him for payment, and in procuring a conveyance of that negro from him, while under age, showed a *capacity*, at least, to take the advantage and overreach him in making contracts. The judgment of the Court below in overruling the demurrer, is sustained, both upon principle and authority. 1 *Story's Equity*, 250, §246. *Pickett vs. Loggon*, 14 *Vesey*, 214. *Butler vs. Haskell*, 4 *Dessaussure's Rep.* 651.

Let the judgment of the Court below be affirmed.

No. 14.—THE JUSTICES OF THE INFERIOR COURT OF MORGAN COUNTY, for the use of Moses Davis, administrator of Levi Butler, deceased, plaintiff in error, vs. ALPHONSO HEMPHILL, defendant.

[1.] By the Act of 1820, in all the cases where, by the 53d sec. of the Act of 1799, the Superior Courts are authorized to exercise the powers of a Court of Equity, a party shall not be driven to the forms of Equity, but may institute his suit on the Law side of the Court, if he conceives that he can establish his claim without resorting to the conscience of the defendant.

[2.] The jurisdiction in all such cases is concurrent.

Debt on guardian's bond. Decided in Troup Superior Court, by Judge HILL, May Term, 1850.

The declaration alleged, that in the year 1831, the Court of Ordinary of Morgan County appointed one Thomas J. Butler guardian of Levi D. Butler, and that the defendant and one Barnabas Woolbright became securities on the bond; that by virtue of this appointment, Thomas J. Butler obtained the property of his ward, and appropriated the same to his own use; that the guardian subsequently died insolvent, without accounting, and there has never been any administration upon his estate; the ward, also, subsequently died, and Moses Davis was appointed his administrator. For his use, the action was instituted against the defendant alone, as security on the bond—the other security being beyond the jurisdiction of the Court.

On the trial in the Court below, the defendant moved to nonsuit the plaintiff, on the ground that it did not appear that any *devastavit* had ever been established against the principal obligor in the bond.

The Court sustained the motion, and counsel for plaintiff excepted.

HILL, for plaintiffs in error.

STEPHENS, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

We have determined that the liability of the surety, on a guardian's, executor's and administrator's bond, is ultimate, and that no recovery can be had against him, until there is a judgment or decree of a Court of competent jurisdiction against the principal in his representative character. Our Act of 1820, authorizing principals and sureties on such bonds to be sued in the same action, does not dispense with this judgment or decree. *When that is had*, it authorizes suit against the principal in his individual character, and the surety or sureties in the same action; but there, the principal must be first sued, or must be joined in the action with the surety, if he is within the limits of the State. That *is*, the surety cannot be proceeded against alone in but one instance, and that is, when the principal is not within the limits of the State. 6 *Geo. R.* 31.

It is claimed in this case, that the principal *being dead and insolvent, and no administration on his estate*, and those facts being averred, in the declaration, the plaintiff may proceed *at law* to charge the sureties, although no judgment or decree has been had against him in his representative character, and although he has not been personally sued to insolvency, and is not a party to the action. This, clearly, cannot be done upon Common Law principles. In such a case, a Court of Common Law has no jurisdiction. The sureties are not liable there at all until, by judgment or decree, their principal has been charged with a *devastavit*, and sued personally to insolvency. Nor does the Act of 1820 help the plaintiff. Since that Act, the judgment or decree against the principal, in his representative character, is still indispensable; and moreover, by the Act, he must be first sued, or must be joined with the surety, if within the State. There is relief for the plaintiff in Chancery. The necessity of the case, and its manifest equity, gives jurisdiction to Chancery. The law, by reason of its universality, affords no relief; *therefore*, Chancery will grant it. So this Court has held. 7 *Geo. R.* 552.

[1.] Our Statute, however, we think, has repealed the Com-

mon Law in this regard, and in the case made, has given jurisdiction to a Court of Law, concurrent with the jurisdiction of a Court of Equity. Our judgment is, that the plaintiff has his option to proceed at law, if *he conceives that he can establish his claim without resorting to the conscience of the defendant*, or go into Chancery. He elects at his peril. If he resorts to a Court of Law, he must abide the forms of proceeding—the law and the relief of that forum. The Statute, injudiciously, as I think and have before said, gives him the right, if, in his imaginings, he *conceives* that he can get along, to make experiments in a Court of Law. He takes the play at the hazard of having the piper to pay. The rule is, if a party has an ample remedy at law, he cannot go into Chancery; and if he can go into Chancery, nevertheless, he can go into law, if he will. It is paradoxical, rather. We cannot, however, get over the broad grant of jurisdiction to a Court of Law, by the Act of 1820. That is an Act declaratory of the 53d sec. of the *Judiciary Act of 1799*: That section specifies the cases in which the Superior Courts shall exercise the powers of a Court of Equity. The enumeration embraces many of the powers of the Courts of Chancery in England. We have held, however, that the jurisdiction is not confined to the enumeration of powers specifically made, but by virtue of our adopting Statute, and authority given to exercise the powers of a Court of Chancery, “in all cases where a Common Law remedy is not adequate,” *general* Equity jurisdiction is conferred. 4 Geo. R. 423. The specification of the Act of 1799, of cases in which the powers of a Court of Chancery shall be exercised, are—1st. To discover transactions between copartners and co-executors. 2d. To compel distribution of intestates’ estates, and payment of legacies. 3d. To discover fraudulent transactions, for the benefit of creditors. In addition to these, there is, as before stated, a broad grant of authority to exercise the powers of a Court of Chancery, “in all cases where a Common Law remedy is not adequate to compel parties, in any cause, to discover, on oath, all requisite points necessary to the investigation of truth and justice.” *Prince*, 447. Now, although the last quoted clause is general, and embraces *all cases* belonging to a class, that is to say, all cases

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where a Common Law remedy is not adequate, yet it is an enumeration of cases. It differs from the other enumerations, only in this—that it is more comprehensive. It is not much more generic in its character than some of them; for example, that which gives power to compel distribution of intestates' estates and payment of legacies, which confers jurisdiction over the whole subject of intestacies and wills. Now, the General Assembly of 1820, legislating upon this clause of the Act of 1799, and the subject matters therein embraced, have said, "that from and after the passage of this Act, whenever, *in any of the cases enumerated* in the before recited section, (having before recited it,) a plaintiff or complainant shall *conceive* that he, she or they can establish his, her or their claim, without resorting to the conscience of the defendant, it shall and may be lawful for any such plaintiff or complainant to institute his, her or their action on the Common Law side of the Court, and shall not be held to proceed with the forms of Equity."

The case made in this record, is a case where the Common Law not only affords no adequate remedy, but no remedy at all. It is, therefore, palpably a case enumerated in the Act of 1799, and by the Act of 1820, one of the cases where the plaintiff shall not be held to the forms of Equity; but if he conceives that he can make out his case without resorting to the conscience of the defendant, shall be at liberty to institute his suit on the Common Law side of the Court. *Prince*, 447. This is too plain to require further comment.

[2.] The Legislature, whilst conceding jurisdiction to the Courts of Chancery in this case, have said that the plaintiff shall not be driven there, but may go into a Court of Law. Whether he will go into the one Court or the other, the Legislature has left to his *conception* of the sufficiency of his remedy. Where the Legislature has placed the plaintiff, there we also locate and leave him.

Let the judgment be reversed.

No. 15.—HENRY P. BROWNER, plaintiff in error, vs. LITTLETON P. STERDEVANT, executors, &c. defendant.

[1.] The old Common Law maxim, that a personal right of action dies with the person, still applies where a *tort* is committed to a man's person, feelings or reputation, as for assault, libel, slander or seduction of his daughter.

Scire facias, to make parties. In Troup Superior Court, decided by Judge HILL, at May Term, 1850.

The plaintiff commenced his action for the seduction of his daughter, an ordinary, "*per quod servitiam amisit*," against one Winston Oliver. Pending the action, Oliver died, and the plaintiff sued out a *scire facias* against the defendant, as his executor, to show cause why he should not be made a party defendant to the suit.

The executor showed for cause, that the action being in form, "*ex delicto*," abated on the death of the defendant.

The Court below sustained the showing, and gave judgment of abatement, and counsel for plaintiff excepted.

HILL, for plaintiff in error.

STEPHENS, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an action by the father, for the seduction of his daughter. Pending the suit, the defendant died, and a *scire facias* was issued against his executor, to make him a party. The representative showed for cause, that it was a personal action for a *tort*, which abated on the death of the party, and the Court sustained the objection, and this judgment is assigned for error.

[1.] We have struggled hard to maintain this proceeding, but find it impossible to do so. The old Common Law maxim of *actio personalis*, notwithstanding the modifications made by the Statute of *Edward*, in relation to personal property, and the still

more recent Act of 4 *William*, respecting real estate, still applies where a *tort* is committed to a man's person, feelings or reputation, as for assault, libel, slander or seduction of his daughter. *Broom's Legal Maxims*, 254.

We must not, in this or any other case, permit our sympathy, or anything else, to draw us off from the position so early taken, and so firmly and uniformly adhered to by this Court, namely: that what is or is not sound policy, is a question for the Legislature, and not for the Judiciary. The line between the legislative and judicial power, should be kept constantly in view by both these departments, and never invaded or transcended by either. It is *our province* to expound and apply, and not make or change the law. We protest alike against *judge-made* law, and the exercise of judicial power by the Legislature.

No. 16.—LOVICK P. HODNETT, plaintiff in error, *vs.* WILLIAM V. TATUM, defendant.

- [1.] Where a payment of money is made to the *authorized agent* of the principal, it is, in law, equivalent to a payment made to the principal himself.
- [2.] The principal cannot, of his own mere authority, ratify the acts of his agent in part, in regard to a particular transaction, and repudiate them as to the rest. He must either adopt the whole or none.

Assumpsit, in Troup Superior Court. Tried before Judge HILL, May Term, 1850.

In May, 1844, the plaintiff in error, Lovick P. Hodnett, gave his promissory note to the defendant in error, Wm. V. Tatum, for seven hundred and twenty-five dollars. Hodnett resided in Georgia and Tatum in the State of Alabama.

On the trial in the Court below, it was in evidence, that some

time after the note became due, to wit: in May, 1844, Tatum sent one Jeremiah A. Spencer, as his agent, to Hodnett, to collect of him a portion of the note, giving Spencer a blank order, to be by him filled with the sum that Hodnett should pay him, and the order thus filled, to be left with Hodnett as a receipt from Tatum. Spencer received of Hodnett four hundred dollars in bills on Alabama banks, which at this time, were at a discount, generally, of some ten or twelve per cent. though receivable at par in payment of State tax, and sometimes received at par by merchants. Spencer received the money from Hodnett at par, and filled the order accordingly. On the same day that Spencer, the agent, received the money from Hodnett, he paid it over to Tatum, who objected to receiving it at par. Spencer then informed him, that if he was not willing to receive it at par, he should return it to Hodnett. Tatum refused to return the money, and also refused to receive it at par, and entered it on the note, as received at ten per cent. discount. The balance of the note had been paid off.

The discount on the \$400 constituted the subject matter of litigation in the Court below.

The Court charged against the defendant, Hodnett, in the Court below, and the Jury returned a verdict accordingly.

The defendant, by his counsel, moved for a new trial on the grounds—

1st. Because the Court erred in not charging the Jury, that if Spencer received the money on Alabama banks, as agent for plaintiff, without objections, and receipted Hodnett, or filled out the order at par value, that plaintiff was bound by such act of his agent.

2d. Because the Court erred in charging the Jury, that plaintiff had a right to receive the money of his agent and retain it at the customary discount, without offering to return it to defendant, or giving him notice of his unwillingness to receive it at par value.

3d. Because the Court erred in charging the Jury, that plaintiff, if he objected to receiving the money at par, was not bound to return it to defendant.

4th. Because the verdict of the Jury was contrary to the evidence.

The Court overruled the motion for a new trial on all the grounds taken, and counsel for defendant excepted.

HILL and WILKES, for plaintiff in error.

STEPHENS, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question in this case is, whether Tatum was bound by the act of his agent, Spencer, in receiving the Alabama money at *par value*. The money was received by Spencer, the special agent of Tatum, from Hodnett, at its par value, and by Spencer paid over to Tatum, with a knowledge that it was so received from Hodnett.

Spencer was the agent of Tatum, to receive the payment of the money due on Hodnett's note, and he received four hundred dollars in Alabama money, *without objection*, which, according to the written order given by Tatum to Hodnett, requesting him to pay the money to Spencer his agent, was to be credited on his, (Hodnett's) note.

The payment to Spencer, the agent of Tatum, by Hodnett, was, in law, equivalent to the payment of the money by Hodnett to Tatum himself. The payment to the authorized agent of Tatum, was, in law, a payment to him. *Story's Agency*, 126. 2 *Kent's Com.* 629. Besides, the money was paid by Spencer to Tatum, who received it, knowing it was received from Hodnett at par value, and of his own mere authority, credited on the note at *ten per cent. discount*.

[2.] The principal cannot, of his own mere authority, ratify the transaction of his agent in part, and repudiate it as to the rest; he must either adopt the whole, or none. *Story's Agency*, 245, §250. If he did not intend to ratify the act of his agent in receiving the Alabama money, he ought to have returned it within a reasonable time, and not have retained it upon his own *arbi-*

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trary terms. When a principal, with a knowledge of all the facts, adopts the acts of his agent, he cannot afterwards impeach his conduct. *Cairnes & Lord vs. Bleuker*, 12 *John. Rep.* 305. We are of the opinion that the principal was bound by the act of his agent, in receiving the money in this case, and especially is he so bound, after receiving the money from his agent and retaining it.

Let the judgment of the Court below be reversed.

No. 17.—BARNARD BRADY, plaintiff in error, vs. THOMAS DAVIS, jailor, defendant.

[1.] A warrant to arrest a person accused of crime, *before* indictment, must specify the offence and the authority under which it is issued—the person who is to execute it and the person to be arrested; and the warrant of commitment must describe the offence plainly and fully, and the time and place of its commission.

[2.] A bench warrant and a warrant of commitment, *after* indictment, are sufficient, if they recite the fact of indictment and describe the offence generally.

Motion to discharge on writ of *habeas corpus*. Decided by Judge HILL, at Chambers, June 5th, 1850.

The plaintiff in error, being confined in prison in Troup County, sued out a writ of *habeas corpus*, and on the hearing, the jailor showed, as authority for his detention, a bench warrant and the mittimus of the magistrate, and further stated, in his return, that the offence with which prisoner was charged, was “peddling without a license.” Both the warrant and mittimus stated the offence simply as a misdemeanor, founded on the special presentment of the Grand Jury of Troup County. Neither stated the particular misdemeanor; or the time and place when and where committed.

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The plaintiff in error, by his counsel, moved for a discharge on two grounds—

1st. Because it appeared that the prosecution was not in accordance with that portion of the Statute prescribing the method of proceeding in such cases—there being no affidavit as required by such Statute.

2d. Because neither the crime of which the prisoner was accused, nor the time and place when and where such crime was committed, were plainly and clearly set forth in either the warrant of arrest or the mittimus, and the arrest and imprisonment of the prisoner was illegal.

The Court overruled the motion, and ordered the prisoner to be recommitted, on failure to give bond and security, in the penalty of \$400

To which decision, counsel for the defendant excepted, and assigned error.

HILL, for plaintiff in error.

STEPHENS, for defendant.

By the Court.—NISBET, J. delivering the opinion.

It does not appear, as claimed by counsel for the plaintiff in error, that the prosecution, in this case, was instituted under the Act of 1824. If it did, it would be still a matter of doubt, whether a person is not liable to presentment for the offence created by that Act. It is not worth while, however, to discuss that question, because the Act of 1845 creates the offence with which the plaintiff in error is charged, to wit: peddling without a license. That Act makes such peddling a *misdemeanor*, and prescribes no form of procedure. The Grand Jury may, therefore, present for that offence. The first ground of error is not sustainable. *Acts of 1845, page 36.*

Nor do we think the second ground well founded. The objection to the warrant is, that it does not plainly and clearly set forth the offence, and the time and place when and where it was

committed. The same objection is made to the mittimus. This was a bench warrant, issued by the Circuit Judge. It is founded on a *special presentment* of the Grand Jury of Troup County. It recites that the plaintiff in error was presented at the May Term, 1850, for the offence of a misdemeanor. The mittimus recites the same facts following the warrant.

[1.] A warrant issued before indictment must specify the offence charged—the authority under which it issues—the person who is to execute it, and the person to be arrested. 1 *Russell on Crimes*, 618. And it is necessary that the mittimus or warrant of commitment set forth the particular species of crime alleged against a party with *convenient certainty*. This, for several reasons, but chiefly, that if the party be brought up for discharge or bail on *habeas corpus*, the Court may be enabled to judge whether or not he be guilty of the offence charged. 11 *Stra.* 304, 318. 2 *Wils.* 158. *Cro. Jac.* 81, '2, *Harok. b.* 2, c. 16, §16. 1 *Hale*, 584. 2 *Ibid*, 122. 2 *Inst.* 52. 14 *East.* 70, '2, '3. 1 *Chitty's Cr. Law*, 90. Our own Statute requires that the offence, and time and place of committing it, shall be *plainly* and *clearly* set forth in the warrant of commitment. *Prince*, 616. Such is the law as to warrants *before* indictment.

[2.] But *these* warrants are *after* presentment or indictment; they stand upon different ground. If the accused, after indictment, is in Court or in custody, as soon as convenience admits, he is arraigned and put upon his trial; if not, *process* must issue to bring him into Court. It is so called, because it *proceeds* or issues forth, in order to bring the defendant into Court to answer, and signifies the writs or judicial means by which he is brought in; and that proceeding, which, *before* indictment, is called a warrant, is, *after* the indictment found, called process. Its object is simply to bring the accused into Court, and when so brought in, he is retained by bail or commitment. Every Court which, by law, can hear and determine offences, can issue process to bring the accused in to answer. At Common Law, in cases of misdemeanors, the bench warrant could issue to bring the accused in during the assizes, and after the sessions, upon the appli-

cation of the prosecutor, the clerk was bound to grant a certificate of the indictment having been found, upon which any Judge of the King's Bench, or Justice of the Peace of the County, would grant a warrant. By Statute of 48 *Geo. III.* the power to issue the warrant is extended to all offences under the grade of treason and felony. Our Superior Courts, having jurisdiction to hear and determine in criminal cases, upon Common Law principles, and by statute, may, after indictment, issue the process called a bench warrant, to bring the defendant into Court. 1 *Chitty*, 276, 280. The warrant, in this instance, and the mittimus, do not recite that an indictment has been found; but that does not vary the principles which apply to this case. They recite that the Grand Jury did, at the term of the Court designated, find a special presentment against the plaintiff in error, for a misdemeanor. This presentment differs from an indictment only, in its being, in the first instance, taken by the Grand Jury. It is in the nature of instructions for the indictment, and when delivered into Court, it is the duty of the State's officer to make out an indictment thereon, to which, without further inquiry by the Grand Jury, the accused must answer. 1 *Chitty's C. L.* 134. It is equivalent to an indictment for the purpose of bringing the accused into Court. The law presumes that the State's officer has done his duty, and that the indictment has followed the presentment. The process is based, in all such cases, upon the presentment. *That* must be as full as the indictment itself, for the defendant cannot be indicted but according to the presentment. By the presentment, as by the finding of a true bill in other cases, the defendant is already found, *probably*, guilty. Now, the presentment being in Court, upon *that*, the Court, cognizant of its own records and files, can issue the process to bring the accused to trial. Considering, then, the ground upon which, and the object for which it issues, it is alone necessary that the process should recite the presentment and the crime *generally*. The specifications as to time and place, and the description of the offence, is in the presentment and indictment; or if not, the defendant cannot be convicted. And if the defendant

is committed, the warrant of commitment need only follow the bench warrant.

Let the judgment be affirmed.

No. 18.—HENRY JACKSON, plaintiff in error, vs. BENJAMIN H. GRAY and another, defendants.

[1.] Where G obtained the legal title to land, as *security* for the money advanced by him to R, the *vendor*, for J, the *vendee*, promising to re-convey the same to J, on the repayment of the sum so advanced, with 20 per cent. interest, but fraudulently sold the land to another, who bought with notice: *Held*, that under such circumstances, a Court of Equity would adjudge the defendants *trustees* for the party defrauded, and decree a specific performance of the contract, or pecuniary compensation for the property.

In Equity. Decided by Judge STARK, May Term, 1850, of Houston Superior Court.

This was a bill filed to compel specific performance.

The bill alleges that the complainant, Henry Jackson, was the owner, in fee simple, of lot of land No. 165, in the 5th district of Houston County; that in the year 1843, Alger, as Constable, levied on said lot of land, by virtue of *fi. fas.* issued from a Justice's Court—there being personal property in the possession of complainant, more than sufficient to have satisfied said *fi. fas.* In the month of May, 1843, the land was sold at public outcry, by the Sheriff of Houston County, when Charles H. Rice was the highest bidder, and the same was knocked off to him. Rice took no titles from the Sheriff, and allowed the complainant to remain in possession of the land, under a parol contract to the effect, that if, in three weeks from the time the land was sold by the Sheriff, complainant would pay to Rice the sum of \$450, Rice was to relinquish all claim to the same to the complainant.

The bill charges, that complainant applied to Benjamin H. Gray, who was at the time a money lender, and proposed to him to advance the money to Rice, as a loan to complainant, who should remain in possession of the land, while Gray was to take titles to the land from the Sheriff, as security for the money so advanced, which were to be re-conveyed to complainant, provided complainant paid to Gray \$480 by the 1st day of January, 1844.

The bill alleged, that Rice abated fifty dollars from the original amount proposed to be taken for the benefit of complainant; that the contract with Gray, owing to the confidence reposed in him by complainant, was not reduced to writing; that Gray procured a deed to be executed to him from the Sheriff, without any condition, and failed to give to complainant any defeasance or counter deed—all with a view to defrauding complainant.

The bill charges that within the time specified, to wit: on the 1st day of December, 1843, complainant tendered or offered to pay to Gray the sum of four hundred dollars, with interest thereon, at and after the rate of 20 per cent. per annum, which he refused to receive.

The bill charges, that on the 10th day of October, 1843, while complainant was still in possession of said land, by virtue of his contract with Gray, the latter sold said land to Isaac Alger, for the sum of seven hundred dollars—the said Alger purchasing with a full knowledge of the agreement existing between complainant and Gray.

Complainant offered, in his bill, to pay to Gray the amount of money agreed to be paid him for the land, and charged confederacy between Gray and Alger, to defraud him out of the land.

To this bill, an amendment was subsequently filed, which alleged that although Rice, on the day of Sheriff's sale, was the highest bidder, yet no money was ever paid by him, in compliance with such bid, and that no note or memorandum was ever made of the sale or bid.

By their answer, the defendants admitted the purchase, by Rice, of the land, at Sheriff's sale, but denied any knowledge of

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a contract between Rice and the complainant, as charged in the bill. The answer also denied all the obligations in the bill, as to Gray's advancing the money to Rice for the land, for the benefit of complainant, or as a loan to him.

In their answer to the amended bill, which came in during the term of the Court at which the cause was tried, the defendants pleaded the Statute of frauds.

On the trial, counsel for complainant moved to strike said plea, on two grounds—

1st. Because said plea was filed too late.

2d. Because the plea was not set up in bar of the relief prayed for by the original bill, but was embodied in the answer to the amended bill.

The Court proposed to allow the complainant to continue the cause on the ground of surprise, which was declined, and the objections to the plea were overruled. To which counsel for complainant excepted.

The bill and answer having been read to the Jury, counsel for defendant moved to dismiss the bill for want of equity, which motion was sustained by the Court, and complainant excepted.

KING, HALL and ROGERS, for plaintiff in error.

WARREN and SCARBOROUGH, for defendants.

By the Court.—**LUMPKIN, J.** delivering the opinion.

[1.] Should the complainant's bill have been dismissed for want of equity? What are the facts in this case? Henry Jackson, the complainant, was the owner of lot No. 165, in the 5th district of Houston County. One Henry Feagan, having some Justices' Court *fi. fas.* against Jackson, caused them to be levied by Isaac Alger, a Constable, on the lot of land which was sold by the Sheriff, on the first Tuesday in May, 1843; and Charles H. Rice, being the highest bidder, the same was knocked off to him at the sum of \$230. No money was paid at the time. Subsequent to the sale, an agreement was entered into between

Jackson *vs.* Gray and another.

Rice and Jackson, by which the latter was to retain the property, provided he would pay Rice \$450 in three weeks; and by virtue of this arrangement, Jackson remained in possession of the premises. Not having the money himself, Jackson applied to Benjamin H. Gray, a cash capitalist and money lender, who agreed to advance the \$450 to Rice for Jackson, provided he would refund the amount, with 20 per cent. interest, on or before the 1st of January, 1844, and Gray was to take a deed to himself, as security for the loan. Gray paid the purchase money to Rice—*Rice deducting \$50 from the price, through kindness to Jackson*, and a Sheriff's deed was made to Gray. The bill charges that Gray had nothing to do in making the contract, but acted solely as the friend and trustee of Jackson in paying the money. Within the time specified, to wit: on the first of December ensuing, Jackson tendered to Gray principal and lawful interest and usury, and demanded titles. But Gray, in the month of October preceding, sold the land to Isaac Alger, the Constable, for \$700, who ejected Jackson from the premises. The bill charges that Alger had notice of all the equities between the parties, and that the land is worth \$1000; and it seeks to cancel the deed from Gray to Alger, and to have a conveyance executed to the complainant, or to have the value of the land paid the complainant, together with the rents, issues and profits which have accrued since his eviction. Is this contract void by the Statute of frauds?

Most clearly not. The parol agreement has been so far performed, that a Court of Equity will compel its execution. The price paid to Rice for the land, was the money of Jackson. He borrowed it of Gray for that purpose, giving him twenty per cent. on the loan, and a deed to the land, as security for its repayment at a time designated. Re-payment was tendered within the time stipulated. Gray then held the title as *trustee* for Jackson.

But again, Jackson's possession was neither wrongful nor independent of the contract with Rice, but under and by virtue of that contract. It was not by virtue of his original ownership or tenancy, but solely and exclusively under and by virtue of

the subsequent agreement between Rice and himself. Under the facts alleged in this bill, could Rice, before payment, or Gray, afterwards, have treated Jackson as a trespasser, had he gone into possession under this contract? Certainly, if this parol contract is to be deemed a nullity.. And yet, if it can be established by clear and competent proof, a specific performance will undoubtedly be decreed, as upon every principle of justice it should be.

Cameron vs. Ward, (8 Geo. Rep. 245,) was a weaker case than this; and yet this Court, very properly holding that the Statute was enacted to *prevent* fraud, and not to *protect* it, determined that the bill made a proper case for Equity jurisdiction, and that the defendants who had there, as here, obtained the title as security for the money advanced by them for the complainant, should be held as *trustees* for the party defrauded, and should not be allowed to shelter themselves under the Statute.

And I would take occasion to remark, that while we renounce all claim to a latitude of jurisdiction in such cases, and do not feel at liberty to depart from the settled course of adjudications upon the Statute of frauds, yet, that under our Special Jury system, so far from construing the Statute *strictly*, we are rather inclined to give a liberal construction to the exceptions which have been established to withdraw cases from its operation, believing, as we do, that in this way we shall best subserve the purposes of justice and honesty.

And taking this view of the main question, it becomes unnecessary to decide any other made in the record.

Let the judgment be reversed.

No. 19.—ALFRED WELLBORN, plaintiff in error, vs. ROBERT BONNER, defendant in error.

[1.] Where B obtained a judgment against W for \$1200, and subsequently thereto, W purchased two judgments against B for the sum of \$1384, and took a written assignment thereof, and filed his bill to have the latter judgments set off against the former, as a satisfaction of the same: *Held*, that according to the provisions of the Judiciary Act of 1799, it should *affirmatively* appear, that there were no other judgment liens upon the defendant's property, before a Court of Equity would interfere and decree satisfaction of a *particular* judgment out of the defendant's property, and that, according to the facts stated in the complainant's bill, he had an ample and adequate remedy at law, to obtain satisfaction of his judgments out of the property of the defendant.

Application for an injunction to Judge HILL. Refused at Chambers, June 29th, 1850.

The bill alleged that Robert Bonner, the defendant, at the February Term, 1850, of Merriwether Superior Court, recovered a judgment against the complainant, for the sum of twelve hundred dollars damages, whereon an execution had been issued, which was then in the hands of the Sheriff, to be enforced by levy and sale.

The bill further alleged, that on 26th day of March, 1850, the complainant, in good faith, and for a valuable consideration, purchased from the surviving partners, in the firm of Millers, Ripley & Co. two executions against the defendant and one Seymour R. Bonner, amounting in the aggregate, at the date of the judgments, to the sum of thirteen hundred and eighty-four dollars, and which were transferred to the complainant by written assignments. Upon each of these executions, there were returns of "no property," by the proper officer; that Seymour R. Bonner, one of the defendants, is beyond the jurisdiction of the State, and insolvent.

The bill further alleged, that complainant, by his counsel, had proposed to the defendant to set off the executions which he held against defendant and Seymour R. Bonner, against the execution in favor of the defendant against complainant, then in the

hands of the Sheriff; that this proposition was rejected, and as a pretence, the bill alleges, that the defendant stated that his counsel had a claim upon the amount of his recovery against the complainant for their professional charges, in prosecuting the suit upon which said judgment was founded.

The bill further alleges, that complainant purchased the execution from Millers, Ripley & Co. without any notice of any such claim on the part of Bonner's counsel.

The bill prays that the executions may be set off against each other, and that defendant may be restrained from assigning or further prosecuting his execution against the complainant.

Judge Hill refused his sanction to the injunction, and counsel for complainant excepted.

SLAUGHTER and RUSSELL, for plaintiff in error.

W. DOUGHERTY, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The assignee of the judgments occupies precisely the same position, as to all his legal rights, as did the original plaintiffs against the property of the defendant, and has the same right to collect the same for his own use and benefit, in as full and ample a manner as the original plaintiffs could have done, if no such transfer or assignment had been made. *Prince*, 465. That judgments may be set off, both at Law and in Equity, is admitted; but the latter Court has no jurisdiction, when, from the facts of the case, the complainant has an ample and adequate remedy in the Common Law Courts.

In this case, it appears from the record, that complainant was not the owner of the judgments against Bonner, until *after* the rendition of the judgment in favor of Bonner against him. The judgment in favor of Bonner against Wellborn, the complainant, was rendered in February, 1850. In the month of March thereafter, the complainant purchased and obtained an assignment of the judgments against Bonner. At law, both parties were enti-

tled to the process of execution, to enforce the payment of their respective judgments. The complainant, who is the assignee of the judgments against Bonner, asks the interference of a Court of Equity to restrain the collection of Bonner's judgment against him, and that the judgments which he holds against Bonner may be set off, and operate as a *satisfaction* of the judgment obtained by Bonner against him. Each party holds a judgment against the other at this time, but there was no *mutual indebtedness* between the parties *at the time of the rendition of the judgment* in favor of Bonner against Wellborn. Wellborn, as the assignee of Millers, Ripley & Co. has the same right to collect the judgment and execution assigned to him, for his own use and benefit, in as ample a manner as the original plaintiffs could have done.

According to the Judiciary Act of 1799, all the property of the defendant is bound by the judgment from the date thereof. *Prince*, 426. Bonner sues out his execution against Wellborn, and the Sheriff collects the money; the money is in the custody of the law; the money is the *property* of Bonner, and subject to the payment of his debts. What is to hinder Millers, Ripley & Co. from placing their judgments in the hands of the Sheriff, with notice to retain the money until the next term of the Court, and then, for the money to be distributed according to the respective liens upon it, created by law? The complainant, who is the assignee of Millers, Ripley & Co. has precisely the same right; and then, all the liens created by law will be considered and adjudicated accordingly. But suppose a Court of Equity should interfere in favor of the complainant, who is a purchaser of a judgment lien upon the defendant's property, *subsequent* to the rendition of the defendant's judgment against him, and decree a set off or a satisfaction of the defendant's judgment, with the judgment so purchased by the complainant, it will be perceived, that if this is allowed to be done, a *junior* judgment might be purchased, and satisfaction had thereof out of the defendant's property, to the *exclusion* of other judgment creditors, who might have a *prior* lien upon the property of the defendant, and thereby defeat the provisions of the Judiciary Act of 1799. It is true, it does not appear on the face of this record, that there

are any older judgment liens against Bonner than the one sought to be set off; but in our judgment, it ought, at least, to be made *affirmatively* to appear, that there are *no other liens of older date* upon the defendant's property, before a Court of Equity should interfere, to appropriate the defendant's property, in satisfaction of a *particular* judgment, in view of the special provisions of our Judiciary Act of 1799. The sole object of the complainant's bill is, to have two judgments, which he has purchased from the original plaintiffs, *satisfied* out of the *property* of the defendant, Bonner, which the latter is entitled, by law, to receive from the complainant. Now, whether this satisfaction is to be obtained under the name of a *set off*, or by any other name, the effect is the same; it is to *extinguish* Bonner's judgment against Wellborn with the two judgments which the complainant has purchased *since* the rendition of that judgment against him in favor of Bonner. Wellborn's two judgments, which he holds as assignee, are to be *satisfied* out of the defendant's property, without it being made *affirmatively* to appear to the Court that there are *no other liens created by law* which would be entitled to satisfaction. Before a Court of Equity should interfere, under our law, to decree the *satisfaction* of a *particular* judgment out of the property or effects of a defendant, by way of set off, or otherwise, according to the facts as made in this case, it should clearly be made to appear that there is no other *judgment lien* which can claim priority of payment and satisfaction. Believing, as we do, that the complainant has an ample and adequate remedy at law, to obtain satisfaction of his judgment, according to the case made by his bill, we affirm the judgment of the Court below.

Wellborn and Duncan *vs.* Williams and others.

No. 20.—CARLETON WELLBORN and JAMES DUNCAN, plaintiffs in error, *vs.* THOMAS WILLIAMS *et al.* defendants.

[1.] The lien of the vendor for the purchase money will not be enforced in favor of the assignee of the notes given therefor.

In Equity, in Houston Superior Court. Decided by Judge STARK, April Term, 1850.

This was a bill filed by the complainants, to enforce a vendor's lien.

The bill alleges, that in the year 1838, one John Martin sold to T. and S. Williams a lot of land in the County of Houston, who executed to the said Martin their two promissory notes for seven hundred dollars each, as a part of the purchase price therefor. One of the notes was made payable on the 25th day of December, 1838; the other, twelve months thereafter. Martin subsequently obtained judgment against T. and S. Williams on the first of said notes, upon which execution issued.

The bill alleges that afterwards, for a valuable consideration, Martin assigned and transferred to complainants the said judgment and execution, and also transferred to them the other note, on which they afterwards obtained judgment; that the execution in favor of Martin had been levied upon the land.

The bill alleges that T. & S. Williams, in a short time after the sale of said land, became insolvent, and have ever since been unable to pay their debts. The bill further alleges, that Wiley, Parish & Co. and a number of other creditors, had obtained judgments against T. & S. Williams, which were of older date than complainants', but that the most of the notes, upon which said judgments were predicated, were made previous to the sale of the land. The prayer of the bill was, that the land sold by Martin to T. & S. Williams, or the proceeds thereof might, by decree, be declared to be subject to the claims of complainant, in preference to the judgments of other creditors, and they perpetually enjoined from levying upon said

land or claiming the proceeds thereof, when sold, until the claims of complainants are discharged.

To this bill, the defendants filed a demurrer on several grounds.

The Court sustained the demurrer on the ground that the transfer and assignment of the note and judgment, the evidence of the purchase price of the land in complainant's bill mentioned, without any assignment or contract for the assignment of the vendor's lien, does not carry with said transfer of said note and judgment the vendor's lien, so as to enable the assignee to set up the same and dismissed the bill.

To which decision of the Court counsel for complainants excepted.

ROGERS, POWERS and GILES for plaintiff in error.

HINES, KILLEN and POWERS & WHITTLE for defendants in error.

By the Court—NISBET, J. delivering the opinion.

[1.] The judgment of this Court is invoked to extend the vendor's lien for the purchase money to the assignee of the note given for the purchase money.

This was a naked assignment by the vendor of one of the notes of the vendee, given for the purchase money, and of a judgment founded on the other note—there being two. There was no indorsement or undertaking to be liable, of any kind, on the part of the vendor, and no contract or agreement by which the lien was assigned. The question is, whether, upon a naked assignment of the notes of the vendee, the lien of the vendor attaches to the notes in the hands of the assignee. Upon principle and authority, our judgment is, that it does not.

I admit that a contrary idea is sustained by some of the analogies of the law. Generally, for example, the *incidents* follow the *principal*. The transfer of a note, secured by a mortgage, carries with it the mortgage security. But the vendor's lien is peculiar; it is *sui generis*, and distinguished from those things

to which it bears some resemblance. Mr. J. *Story* and Lord *Eldon* trace it to the *Civil Law*. By the Roman Law, the vendor of property had a privilege or right of priority of payment, in the nature of a lien on the property for the price for which it sold, not only against the vendee and his representatives, but against his creditors and subsequent purchasers. It was a rule of that law, that although the sale passed the title of the thing sold, yet it implied a condition that the vendee should not be master of the thing sold, unless he had paid the price, or had otherwise satisfied the vendor in regard to it, or unless a personal credit was given to him without satisfaction. “*Quod vendide non aliter fit accipientes quam si aut pretium nobis solutum sit, aut satis eo nomine factum; vel etiam fidem habuerimus emptori sine cellæ satisfactione.*” No such privilege or lien exists by the Common Law. The Courts of Equity, impressed, no doubt, with the justice of the rule, established what we call the vendor’s lien. That lien does not exist by virtue of the Civil Law. Although the idea of it was thence derived, yet it is the creature of the Courts of Equity; and it is of force according as it is regarded by those Courts. The foundation of it is the strong naturally equitable proposition, that he who has gotten the estate of another ought not to retain it without paying the full consideration money. This principle is made available by holding the vendee a trustee for the vendor, to the extent of the purchase money, of the land sold to him. Such is a brief statement of the origin of the vendor’s lien. 2 *Story’s Eq. Jurisp.* §§1217 to 1223. *Mackreth vs. Symmons*, 15 *Vesey*, 340. 1 *Mason’s Rep.* 190.

This lien may be enforced, not only against the vendee and his heirs, but against purchasers claiming under him, with notice of the vendor’s equity. 2 *Story’s Eq. Jurisp.* §1217. It is not so well settled how far it is good against creditors. Ch. J. *Marshall*, in *Bailey vs. Greenleaf*, says, that there is not a case to be found in the American books which sustains it against creditors. That case decides that it cannot be sustained against creditors holding under a *bona fide* conveyance from the vendee, and this decision meets the approval of Ch. *Kent*. 6 *Wheat. R.* 46. 4 *Kent’s Com.* 154, note. The decision of the Supreme Court has been

controverted elsewhere. See *note 6, Kent's Com.* 154. I do not enter into this enquiry. It is good against the assignees in bankruptcy of the vendee. They come in by operation of law, pay no value; and occupy the position of the vendee. 2 *Sugden's Vendors*, 141. 1 *B. Ch. R.* 420. 6 *Vesey, Jr.* 95, *n. a.* 12 *Ibid*, 346. It survives to the personal representatives of the vendor. *Story's Eq. Jurisp.* §1217. There are instances where it is enforced in favor of third persons. For example, it may be enforced by marshaling the assets of the vendee in favor of legatees and creditors, and giving them the benefit of it by way of substitution to the vendor, when he seeks payment out of the personal assets of the vendee. *Story's Eq. Juris.* §1227. *Sugden on Vendors*, ch. 12, p. 549 to 556, 7 edit. *Selly vs. Selly*, 4 *Russ. R.* 336. *Mackreth vs. Symmons*, 15 *Vesey*, 340. 9 *Vesey*, 209. This is well settled, although at one time doubted. So, if a subsequent incumbrancer or purchaser from the vendee is compelled to pay the lien of the vendor, he is entitled to be substituted to his place against other claimants under the vendor against the estate, and to have the assets marshaled in his favor. *Malone vs. Bale*, 2 *Vern.* 84. 2 *Story's Eq. Jurisp.* §1227.

I do not find in the English books a single case in which it has been enforced in favor of the assignee of the note for the purchase money. An enquiry into the character of the vendor's lien will show, that upon principle, it cannot be done. As a general rule, third persons have no interest in it. The two instances above stated, where it has been enforced in favor of third persons, were relied upon to sustain its extension to the assignee of the notes. When I come again to examine them, it will be seen that they go upon very different principles. We have seen that this is an equitable lien in the nature of a trust. The trust in favor of the vendor is implied, and thus it steers clear of the Statute of frauds. It is really difficult to determine, from the language of the books, upon what principles the Courts of Equity have gone in establishing this lien. It is sometimes spoken of as a natural equity, recognized by the laws of all civilized States, which Courts of Equity, acting upon the conscience of the parties, will enforce; and aside from the idea of trust, that Court has

arbitrarily declared it a rule or doctrine in Chancery. To reconcile the *doctrine* to general principles, and particularly to avoid the intervention of the Statute of Frauds, the invocation of a trust by implication is made. Hence, it is called a lien in the nature of a trust. It is also assimilated to an equitable mortgage, and is frequently so called. It is also spoken of as an implied contract growing out of the transaction of sale, by which it is agreed that the vendor shall have this security for his purchase money. The latter idea is repudiated by Mr. Story. He says, "Although in some cases it might be perfectly reasonable to presume such a consent or agreement, the lien is not, strictly speaking, attributable to it, but stands independently of any such supposed agreement." *Story's Eq. Jurisp.* §1220. It has been traced, as before stated, to the Roman Law. That Law placed it upon the ground of a natural equity. "*Tamen recti dicitar et jure gentium id est, jure naturali, id effeci.*" *Just. Lib. 2, tit. 1, §49.* "Therefore," says Mr. Story, "when Courts of Equity established this lien, as a matter of doctrine, it had the effect of a contract, and the lien was held to prevail, although perhaps no actual contract had taken place." *Story's Eq. Jurisp.* §1229. Thus we see that this great commentator could call it nothing more than a *matter of doctrine* established by the Courts of Equity, upon the basis of natural justice, which, in the absence of a contract, had the effect of a contract. By *matter of doctrine*, I suppose, must be meant an arbitrary rule or law of the Courts of Chancery, to which is arbitrarily given by that Court the force and effect of a contract, because it is an arbitrary rule, it is but rarely attempted to make it harmonize with general principles. It stands the legislation of the Courts of Chancery. As such, we have received it by our Adopting Statute. Being the creature of that Court, it is to be enforced according to the course of Equity decisions. And if (which is not the case) the Courts of our Union had extended it to the assignee of the notes for the purchase money, that not having been done by the British Courts, we would be governed by the limitations put upon it in England. This *doctrine* or rule has reference to the parties primarily, and contemplates the relation of vendor and vendee. So far as the

vendor is concerned, it is personal to him. So far as the vendee is concerned, it has been extended to his heirs, and those claiming under him, with notice of the equity with which he stands charged.

We are to inquire whether this right or priority or lien, whatever it may be called, as recognized in the hands of the vendor, is by him assignable. If it existed by contract, the question would be different. We have seen that it does not. It is called an *incident* to the contract. But it is not an incident which springs out of the contract—it is an equity which seems to exist independent of it. Indeed the contrary inference is deducible from the contract. The deed is executed—the vendor divests himself voluntarily of the title to the land—he takes the notes of the purchaser, and seems to rely upon the security which they afford for his purchase money. The solemnity and finality of the transaction thus closed, seems to negative the idea of anything reserved—of any *incident*. At law, the thing is concluded—no such incident can be there made to spring out of it. Equity, however, comes in with the purpose of enforcing a natural equity, and arbitrarily makes the lien an incident to the contract. In this view of it, it cannot be assignable. For it can in no proper sense be said to exist until it is declared to exist by a decree in Chancery. I know that it is held to exist, *prima facie*, and the burden of showing a waiver lies upon the vendee. Yet, it is now well settled that what is or is not a waiver, is a matter to be determined by the Courts upon the facts exhibited. 15 *Vesey*, 340. Who, then, shall say, in any case, that the lien exists as a matter of positive right until it is decreed to exist; and if it be dependent for its entity on a judgment of a Court, how can it be negotiable? That it does not exist, until a decree establishes it, see *Gilman vs. Brown et al.* 1 *Mason's R.* 221. In that case, Judge Story says, speaking of the vendor's lien, “it is, in short, a right which has no existence until it is established by a decree of the Court in the particular case.” If this be a correct view of it, and it be still held assignable, then it must be negotiable as a possible, but not an existing lien. I need not stop to demonstrate how adverse

such a thing is to the well established rules of the law merchant, nor what confusion it would introduce into all the business circles of life into which it might enter. According to this view of it, how wise is not that limitation which treats the lien as a privilege or priority personal to the vendor. The manner in which it is made an incident to the contract of sale, to wit: by the judgment of a Court, suggests an obvious distinction between the vendor's lien and a mortgage. It is argued, that the transfer of a note, secured by mortgage, carries with it the mortgage security, and why then should not the transfer of the note in this case carry with it the lien? The proposition is true, but the inference is not legitimate; because of the different nature of the lien. We have seen how that arises. The security of a note, for the payment of money by mortgage, arises by the act of the parties. It is agreed between them, that it shall be so secured. The mortgage is part and parcel of the contract. It is evidenced usually in writing; it is registered; the world has notice of its existence, and that it exists for the purpose of securing the particular debt. Very naturally, therefore, and very reasonably, when the note is assigned, the security goes with it. All parts of the contract go together. The mortgage is given with view to its assignability; it is part of the contract, that it shall be assignable. Not so with the vendor's lien; for about that, the parties make no stipulation whatever. Essentially, therefore, are they different. The vendor's lien differs from an *equitable* mortgage. Take the case of the deposit of title deeds. There the security arises by implied contract. The deposit of the title deeds is made for the purpose of security. The lien arises by the consent or agreement of the parties. 1 *Bro. Ch. R.* 269, *Bett's note*, 1. 9 *Vesey*, 116, 117. 2 *Anst. R.* 427 to 438. 14 *Vesey*, 605. 17 *Ibid*, 228. 3 *M. & K.* 417. 3 *Y. & Coll.* 55. 5 *Wheat.* 277.

I cannot believe, upon principle, that this lien is assignable. But if it were, it must be assigned specially. It does not follow the simple transfer of the notes. It is not an incident to them. It is clear to my mind, that the lien and the notes are separate and distinct. If I might so speak, there is no privity between

them; there is no dependence of the one upon the other. The notes are the evidence of the debt due, or to be paid for the land. They are proof that the purchaser binds his whole estate to their amount. They seem to affect the lien only so far as they are evidence that the purchase money is unpaid. When that is paid, the lien is extinguished, no matter how it was agreed to be paid. The distinctions already drawn, demonstrate the want of connection between the lien and the notes. If the lien attached to the notes, why not assert it upon them in a Court of Law? But that cannot be done; for all the authorities concur in this, that Courts of Equity alone have jurisdiction of the lien. The purchaser of the notes, as in this case, takes them upon the credit which they warrant upon their face. He is not disappointed in not realizing the lien. It is true, that if a note secured by mortgage is transferred, the transferee gets with it the mortgage, although ignorant of its existence at the time of the transfer. In fact the security exists; it belongs to the note. In the case of the lien, it does not necessarily exist, and if it does, it does not belong to the note. If the lien passes to the first transferee with the notes, it must follow them into whosoever hands they may fall. They may circulate for years. Shall they draw after them, in an almost interminable course, a secret, invisible, undefined security? If they do, it must be greatly to the injury of unsuspecting purchasers and creditors of the vendee. It is settled, that if the vendor take the security of a third person, he waives the lien for the purchase money. If he indorses the note to an assignee, if the lien goes with it at all, it will go with it in that event, and the holder has the security of the note, the indorsement and the lien. He is therefore entitled to the lien, under circumstances in which the vendor himself would not be entitled to it. This would be absurd. If indeed the vendor transfers the note with his indorsement, and is made liable thereon, and the lien existed originally in his favor, I have little doubt but that he could then assert it upon the vendee. The equity in that case would be as strong in his favor as it was primarily. *Ex parte Loring*, 2 Rose's Ca. 79. In *Gilman vs. Brown*, Judge Story passes condemnation upon this doctrine. The re-

mark he makes is an obiter, but the opinions of such a man however expressed, are entitled to confidence. Remarking upon the probability of the lien being waived in that case, he says, "The securities themselves were, from their negotiable nature, capable of being turned into cash, and in their transfer from hand to hand, *they could never have been supposed to draw after them, in favor of the holder, a lien on the land for payment.*" 1 *Mason's R.* 218.

In support of the position, that the vendor alone is entitled to this lien, as I understand the authority, it has been decided that if a third person covenant to pay a part of the purchase money to a person other than the vendor, such other person has no lien upon the land for such part of the purchase money, unless it be agreed that he shall have the lien. 3 *Sim. R.* 499. 1 *M. & K.* 297. 2 *Keene*, 81. In the United States, the weight of authority is against the plaintiff in error. In New York, in Maryland and in Ohio, it has been decided, that the vendor's lien cannot be enforced in favor of the assignee upon a transfer of the notes for the purchase money. 7 *Gill. & Johns.* 120. 1 *Bland. Ch. R.* 524. 1 *Paige's Ch. R.* 502. 1 & 2 *Ham. R.* 147. 3 *Sugden on Vendors*, 140, note. In Tennessee and Kentucky, the question has been ruled the other way. See *Eskridge vs. McClare*, 2 *Yerg.* 847. 4 *Litt.* 289. 5 *Monroe*, 287. 2 *Dana*, 99. 4 *Litt.* 317. If the vendor seeks to enforce his lien upon the assets of the vendee to the injury of other creditors, they may have the assets marshaled, and compel him to go upon the land. This is done upon the familiar principle, that one having a claim upon two funds, may, at the instance of him who has a claim upon one of them, be forced to seek satisfaction out of that fund upon which the latter creditor has no claim, in order that both may be paid. This rule makes nothing in favor of the enforcement of this lien in favor of third persons. It is not the enforcement of the lien in favor of the creditors in whose favor the assets are marshaled, but a control which equity takes over the manner in which the vendor himself shall enforce it. Neither does the rule, that purchasers from the vendee who have paid the lien may be substituted to

the place of the vendor, as against other claimants on the estate under the vendor, avail anything for the plaintiff in error. They do not claim the lien from the vendor, nor are they substituted upon the score of being assignees of the lien; but upon the ground, that they stand in relation to vendor and vendee, as sureties for the latter to the former, and having paid the debt, are, in equity, subrogated to the rights of the creditor as against their principal.

The Courts do not favor secret liens. The vendor's is a secret, invisible, unregistered lien. We are wholly disinclined to extend it to the the assignees of the notes, or in any way to break over the limits within which it is now happily confined. Being secret, it is opposed to the policy of all our own legislation upon the subject of liens.

Let the judgment be affirmed.

No. 21.—CURTIS LEWIS, plaintiff in error, vs. WILLIAM M. LEAK and ROBERT ALLEN, defendants.

- [1.] The admission of *ex parte* affidavits is an exception to the general rule, and is allowable only in *waste*, or in cases where irreparable mischief might ensue.
- [2.] On motion to dissolve an injunction upon answer, exceptions filed are no objection to the motion, unless they affect the answer in points relating to the grounds of the injunction.
- [3.] Where the answer of the defendant is not responsive to the bill, but sets up affirmative allegations in opposition to or in avoidance of the complainant's demand, the answer is of no avail, in respect to such allegations, on a motion to dissolve an injunction; and, if replied to, the defendant in the trial is as much bound to establish the allegations, so made by independent testimony, as the complainant is to sustain his bill.

In Equity, in Pike Superior Court. Motion to dissolve injunction. Decided by Judge STARK, at Chambers, July 5, 1850.

Lewis vs. Leak and Allen.

This was a bill in Equity, filed by the plaintiff in error against the defendants, alleging that, at the December Term, 1849, of Pike Inferior Court, Robert Allen obtained a judgment against complainant for the sum of fifteen hundred and sixty three dollars, principal, and the sum of one hundred and twelve dollars and sixty cents, interest to the 3d day of December, 1849; that a *fi. fa.* issued upon said judgment, and has been levied upon the property of complainant.

The bill alleged, that the said Robert Allen and Leak, on the 1st day of June, 1840, formed a copartnership for the purpose of doing a mercantile business in the city of Griffin, and buying and selling city lots. The extent of their business was unknown to complainant. The copartnership existed about eighteen months, during which time they purchased lot No. 4, in square 33, in the city of Griffin; that at the time of the dissolution, the firm was indebted to John Neal the sum of \$550, to John W. Dunbar \$300, to John W. Brown \$1250, and to Charles Day \$1325—making an aggregate of \$3425; that in consequence of the pecuniary embarrassments of Leak, Robert Allen, by Leak's consent, took charge of all the assets of the firm, consisting of notes and accounts, &c. together with the title to the said city lot, No. 4, in square 33, which, by agreement between the said Allen and Leak, was executed to Allen, individually; that the object of placing the assets of the firm in the hands of Allen was, that he might settle the aforesaid debts of the firm. After which, a settlement was to be had, and each one was to receive his share of the profits arising from the firm business.

The bill alleged, that Allen had received from the assets of the firm, from rents on said city lot, from sales of different parts of the same, and from other sources, the sum of \$7416 96 cents; that in addition thereto, Leak had expended for improvements on said lot, and in money handed to Allen to pay for the same, and in paying off a debt of the firm to Charles Day, in advancements made to Allen in City Hotel stock, and in an order on Hardeman & Hamilton, the farther sum of \$5445 29 cents—making the aggregate sum of \$12,862 25 cents; that after pay-

ing off all the debts of the firm, there still remained in the hands of Allen \$10,762 25 cents, realized by him out of the assets of the firm.

The bill alleged, that Leak was indebted to complainant in the sum of \$1797 56 cents, for which he held his note, dated March 4th, 1850, and due "one day after date"—the said indebtedness having existed long before the rendition of the judgment in favor of Allen against complainant; that Leak was wholly insolvent; that Allen had in his hands, belonging to Leak, more than sufficient of effects to pay the claim of complainant against Leak; that Allen, with the consent and by the express direction of Leak, agreed to allow complainant, upon the debt on which his judgment is founded, whatever amount might be found to be due Leak on a settlement between them as to the assets of the firm; upon which promise and agreement of Allen, complainant relied in good faith; that Allen had refused to have a settlement with Leak, and allow complainant whatever might be due the said Leak; that Allen artfully and fraudulently induced complainant not to urge or set up his defence to the action at Law, in which the judgment was obtained, or to a Court of Equity for an injunction to restrain him from proceeding therein, which complainant otherwise would have done.

The bill alleged, that Allen, having thus obtained his judgment against complainant, now refuses to settle complainant's claim against Leak, or to come to any settlement whatever in relation to the premises.

The bill farther alleged, that the judgment held by Allen against complainant is founded upon a debt which was contracted by the purchase from Allen, by complainant, of a large portion of the said city lot; that Allen had been often requested and instructed by Leak to apply the funds in his hands, (or a sufficiency thereof,) due Leak, to the extinguishment of the claim held by complainant against Leak; that Allen was acting in bad faith in neglecting to comply with his said promises and agreement, and in oppressing complainant by levying upon his property.

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The bill prays, that Allen and Leak may be brought to a settlement, and that the debt due complainant, by Leak, may be allowed as a set-off to the judgment of Allen against complainant; also, for an injunction to restrain Allen from proceeding with his judgment against complainant.

Robert Allen, one of the defendants, answered this bill. By his answer, the defendant admitted that a copartnership existed between himself and Leak, in the mercantile business, about the length of time charged in the bill, the existence of the firm debts specified; but that the amount was greatly more than charged in the bill; that he purchased lot No. 4, in square 33, in the city of Griffin, and payed for the same, individually; that at the time of the dissolution of the partnership, the defendant, at the request of Leak, agreed to take, and did take, the said lot and buildings, to manage the same in such way as to make them, if possible, pay the debts due for the purchase of said lot, (and the defendant took the title to the same); also, to pay a debt due to Brown, and one to Dunbar, as charged in the bill. Defendant denied ever assuming the debt to Charles Day, but that the services of Leak and one Josiah Allen, in the ware-house, situated upon said lot, together with the rent of the store-house for the year during which the dissolution took place, extinguished said debt.

The defendant alleged in his answer, that at the time of the dissolution, said property was not worth, nor could not have been sold for an amount sufficient to have paid said debts of the firm; that the firm, at that time, were also indebted to the defendant in the sum of \$300, cash advanced to the firm, to Johnson, Jones & Co. \$200, and various other amounts not recollected.

The defendant denied taking charge of all the assets of the firm, or ever taking charge of the house and lot, until after the debt to Charles Day was paid, as before stated, and which was for goods purchased from them, which, or the proceeds thereof, were received by Leak and Josiah Allen, who continued business for a short time after the dissolution.

Defendant admitted that he received assets of the firm to the amount of some \$400, in notes and accounts, all of which he afterwards returned to Leak, and, without this, that he received

nothing of said assets except one hundred dollars in an order on Hardeman, as charged in the bill, and five hundred and five dollars from Josiah Allen, and the said town property, which said town property defendant took, at the time of the dissolution of the partnership, to pay the debts of the firm, as far as it would go, (except the Charles Day debt, which was to be paid as before stated,) without bringing himself under any obligation to pay Leak anything whatever; that the consideration for said property was the payment of said firm debts, for which this defendant was bound, leaving the matter entirely at the disposal and management of the defendant, and releasing Leak.

The defendant denied that any legal obligation ever rested upon him to pay Leak anything whatever from the proceeds of said town property, after the dissolution; that the property had been solely managed by himself, at great labor, but that from the change in the times, if he could collect his debt from the complainant, he would be able to save himself from pecuniary loss, and realize a small profit. The defendant admitted, that it had always been his intention, upon the eventual consummation of his transactions in reference to the said firm business, to have given as a compliment to the said Leak and Josiah Allen whatever he realized out of said property, after paying himself for his trouble and expense, and believing that there would be a small balance, he did, in March, 1848, compliment Leak with the sum of \$325. The defendant alleged that the partnership was formed for the benefit of his son Josiah Allen, and not for his own; that he loaned his name to give them credit, and that he considered the said Josiah Allen to have more claim upon the proceeds of said property than the said Leak.

The defendant stated, that the firm of Leak & Allen subscribed for five shares of City Hotel stock, at \$50 per share, and that afterwards, upon settlement, he purchased Leak's share of said stock, and paid him for it \$31 25 cents per share.

The defendant alleged, that at the time of the purchase of the property by complainant from him, for which the debt on which the judgment was founded was created, he believed that complainant was indebted to Leak.



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The defendant positively denied ever having promised the said complainant to allow him any thing upon the indebtedness of the defendant to Leak, or ever having held out any inducements to complainant, to prevent him from setting up any defence at law, either before or after the commencement of the suit in the Inferior Court, although often solicited by complainant so to do, to which solicitations, defendant always replied, that if anything was left after the payment of the firm debts, it would be very small, and was willing, if he should think proper to compliment Leak, that it might go, not in payment of the judgment debt, but in the way of another note for \$250, still held by the defendant against complainant, and which is not in suit, with the approbation of Leak.

The defendant alleged, that he had been served with summons of garnishment, at the instance of David Cooper and others, creditors of Leak, returnable to the next Inferior Court of Pike County.

The defendant also pleaded the Statute of Frauds.

Upon the coming in of Allen's answer, his counsel moved for a dissolution of the injunction, which motion was heard and overruled by Judge Stark, at Chambers, April 18th, 1850, and the defendant ordered to answer the following exceptions, filed by complainant's counsel to his first answer:

1st. For that the said Allen hath not, to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth whether the said copartnership between him and the said Leak did not extend to the buying and selling of city lots, as well as doing a mercantile business in the city of Griffin.

2d. For that the said Allen hath not, in manner aforesaid, answered and set forth what was the extent of the said business done by the firm of Leak & Allen.

3d. For that the said Allen hath not answered and set forth, whether the firm of Leak & Allen did not buy lot No. 4, in square 33, in the city of Griffin, during the time they were doing business.

4th. For that the said Allen hath not answered and set forth what was the entire amount of indebtedness of the said firm, or

to whom the said firm were indebted, farther than the bill states ; but only says, that said indebtedness was greatly more than charged by complainant in his bill, and omits to say how much more.

5th. For that the said Allen hath not answered and set forth whether he did not, in consequence of the pecuniary embarrassments of the said Leak, take charge of all the assets of said firm, consisting of notes, accounts, and all the other property and effects of said firm, but makes an indefinite and evasive statement about the said assets...

6th. For that the said Allen hath not answered and set forth what was the object of his taking charge of the firm assets, whether it was not to pay off the indebtedness of the firm, and whether Leak, as a partner in the firm, was not entitled to half the profits after the firm debts were paid.

7th. For that the said Allen hath not answered and set forth whether he has not received the sum of \$7416 96 cents, from the rents of houses on said city lot; from the sales of defendant's part of said lot, and from other sources, and hath not stated what amount he has received. .

8th. For that the said Allen hath not answered and set forth whether the said Leak has not expended the sum of \$5445 29 cents, for improvements on said city lot, in money handed him by Leak to pay for the same, and in paying off a debt of said firm to Charles Day, in advancements made to him in City Hotel stock, and in an order on Hardeman & Hamilton.

9th. For that the said Allen hath not answered and set forth the aggregate amount received by him, and expended by the said Leak, as contained in exhibit B to complainant's bill.

10th. For that the said Allen hath not answered and set forth the amount remaining in his hands, after paying the debts of said firm.

11th. For that the said Allen hath not answered and set forth whether the said Leak is not indebted to complainant the sum of \$1797 56 cents, and how long said indebtedness has existed.

12th. For that the said Allen hath not answered and set forth

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whether the said Leak is not wholly and entirely insolvent, and unable to pay his indebtedness to complainant.

13th, For that the said Allen hath not answered and set forth, directly and fully, whether he did not promise to allow complainant the amount due Leak, in his hands, as a credit on the claim he holds against complainant; but his statement in that respect is neither full nor explicit, but evasive and equivocal, and does not state whether he was not instructed by Leak to pay over his share of the profits of the said firm business to complainant.

14th. For that the said Allen hath not answered and set forth whether the debt enjoined was not founded on the purchase of the said city lot.

To these exceptions, Allen filed the following amended answer:

To the first exception, defendant says, "Said copartnership was formed for the purpose of doing a mercantile business, and did not extend to the speculation in city lots, farther than the purchase of lot No. 4, in square 33, in the city of Griffin, which was purchased by Leak and defendant, to build a store-house upon, from the Monroe Rail Road & Banking Company, for \$1000, payable in four equal annual instalments—the first payable on the 8th day of June, 1841. The notes were signed by Leak and defendant, individually. Afterwards, and before the dissolution of the partnership, several lots were sold off of said lot, and to the best of defendant's recollection and belief, the two first notes were paid off by the sale of parts of said original lot—the two last of said notes were paid by this defendant, out of his individual funds—the lot having been purchased by him, individually, from Leak, and all his (Leak's) interest in and to said property, as set forth in the defendant's answer, first made.

To the second exception this defendant answers, that he does not know what was the extent of the business done by the firm of Leak & Allen.

To the third exception, defendant says he has answered in his answer to the first.

To the fourth exception, defendant answers, that the indebtedness of the firm, at the time of dissolution, was as follows: a debt due to Charles Day & Co. amount as stated in the bill; a debt due to John W. Brown, principal, interest and cost to 5th December, 1842, \$1675 32 cents; a debt due to John W. Dunbar, \$325; a debt due to John Neal, \$510, 9th October, 1842; a debt due to Robert Allen, \$300; a debt due Johnson, Jones & Peck, between one and two hundred dollars—the precise amount of which defendant does not recollect.

The defendant says, that he has answered the 5th exception in his first answer, as fully as he is now able to do.

To the 6th exception defendant says, that at the time of the dissolution of the partnership, the debts as above stated were due by said firm, and the said Leak was not responsible; and this defendant being bound to pay said debts, he agreed or consented, at the special instance and request of Leak, to pay for and take the title to said lot, individually, and as a consideration for the same, to pay the debts above named, except the debt due Charles Day & Co. which was to be paid by the services of Leak and Josiah Allen, as set forth in defendant's first answer.

To the 7th exception, this defendant submits to the Honorable Court, whether he is bound to admit or deny said charge—the said property being the property of this defendant individually.

To the 8th exception this defendant says, that to the best of his recollection, knowledge and belief, they spent in improvements upon said lot, before the dissolution of said firm, the sum of \$600 for store-house, \$400 for ware-house, and \$50 for making fence around it, which was all the improvements done upon said lot up to the time of dissolution, by said firm, and the debt to Brown was for the money borrowed by said firm to pay for said improvements. This defendant denies that Leak ever turned over to this defendant any thing whatsoever in the way of City Hotel stock, other than is answered to in his first answer. This defendant admits that Leak is insolvent, and does not know whether he is indebted to complainant or not.

To the 13th exception this defendant answers, and denies the

charge in the bill in reference to ever having promised complainant to pay the amount in his hands due Leak, to the note, the foundation of said judgment, and says that he never was informed by complainant or any one else, that complainant ever contemplated setting up any defence to said suit, as charged in said bill.

To the 14th exception he answers, and admits that the note, the foundation of the judgment, was given for the purchase of said city lot.

To the amended answer, counsel for complainant excepted, upon the following grounds:

Because the said Allen has not, in his said amendment, answered to the best and utmost of his knowledge, remembrance, information and belief, in the 3d, 7th, 8th, 9th and 10th exceptions, filed by complainant to his original answer.

A motion to dissolve the injunction was made by counsel for defendant; at the hearing of which, before Judge Stark, at Chambers, on the 3d day of July, 1850, counsel for complainant offered *ex parte* affidavits to contradict the answer of the defendant.

After hearing the argument of counsel, the Judge dissolved the injunction, and ordered the *fi. fa.* to proceed, on the following grounds:

1st. Because all the matters on which the complainant's right to an injunction rests, have been fully denied by the answer.

2d. Because, on a motion to dissolve an injunction in a case situated as this is, the Court will not receive and hear affidavits in contradiction to the answer of the answer.

To which decision of Judge Stark, counsel for complainant excepted.

MOORE & ALFORD and A. R. MOORE, for plaintiff in error. A list of the points made by plaintiff's counsel, and the authorities to sustain them.

1st. All the effects of an insolvent may be reached by a Court

of Equity, and applied to the payment of his debts. 1 *Page's Rep.* 641.

2d. Courts of Equity should not dissolve an injunction, before the defendant has fully answered the bill and pending exceptions to the answer. *Mitford's P.* §377.

3d. The redress of plaintiff in error was purely equitable. It could not have been successfully set up as a defence to the action at Law of Allen, one of the defendants in error. 1 *Story's Eq.* §§683, 666, 674.

4th. Courts of Equity will relieve against a judgment at Law, at any stage of the proceedings, when the defence could not have been received in a Court of Law. 2 *Story's Eq.* §§885, 886 and 887. *Fonb. Eq. top p.* 28. 1 *Mad. Ch.* 131, '2. *Kelly*, 329.

5th. Courts of Equity, on a motion to dissolve an injunction, will hear affidavits in support of the bill, and in contradiction of the answer. 5 *Paige's Rep.* 238.

6th. An injunction should not be dissolved till the defendants have all answered.

C. MURPHY, representing D. A. ALLEN, for defendants. Points submitted and authorities cited—

1. The complainant in this bill, by his own showing, is not entitled to enjoin the judgment against him in favor of the defendant, until there has been a settlement between Leak & Allen, or a refusal by Allen to settle with Leak relative to the co-partnership—the complainant not having established his right against Leak at law. 1 *Hill's C. R.* 336. 2 *J. C. R.* 283: 4 *J. C. R.* 687:

2d. An injunction is dissolved, as a matter of course, if the answer denies all the equities in the bill; affidavits are not admissible to contradict it. 1 *J. C. R.* 444: 2 *Id.* 204.

3d. Chancery will not relieve against a judgment at Law, unless the defendant was ignorant of the fact in question pending the suit, or it could not be received as a defence at Law. 1 *J. C. R.* 49.

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4th. On a motion to dissolve an injunction, exceptions filed are no objections to the motion, unless they affect the answer in points relative to the grounds of the injunction. *Doe vs. Roe*, 1 *Hopk.* 270.

5th. If the defendant, on whom the gravamen rest, has fully answered, the injunction will be dissolved, though there are other defendants who have not answered. 2 *J. C. R.* 148.

6th. The promise alleged in the bill, but denied by the answer, to have been made by Allen to pay the balance due Leak on a settlement, to the complainant, Lewis, if it had been made, was void for want of consideration, and barred by the Statute of Frauds. *Prince's Digest*, 915.

By the Court.—LUMPKIN J. delivering the opinion

We do not deem it necessary or proper to notice all the questions made in the argument of this case, or whether or not there was equity in complainant's bill—whether he had not a full, complete and adequate remedy at law—whether, having failed to set up by way of defence to the suit at law, on his note, the matters contained in this bill, he is not foreclosed by the judgment rendered against him in favor of Allen—whether or not Lewis, the complainant, is not compelled to pursue, to every available extent, his remedy at Law against Leak, before he can invoke the aid of Chancery. It is due to candor, however, to state, that had these points been made in the record, we should have found no difficulty in sustaining this proceeding.

But all these matters are waived by the pleadings. The parties have taken issue upon two questions only, namely: *First*, whether, upon a motion to dissolve an injunction in a case like this, it is competent for the complainant to introduce *ex parte* affidavits to support the bill and to contradict the answer; and *Secondly*, whether the answer of Allen, the defendant enjoined, has denied all the equity in the bill upon which the injunction was granted.

[1.] The general rule is against the admission of affidavits in these cases, and the instances in which they are admitted, are

exceptions, as in waste and analagous cases resting on the same principle where irreparable mischief might ensue. We think the application for their admission was properly denied in the case before us. *Berkely vs. Brymer*, 9 Vesey, 355.

[2.] We recognize the doctrine contended for by defendant's counsel, that on a motion to dissolve an injunction upon answer, exceptions filed are no objection to the motion, unless they affect the answer in points relating to the grounds of the injunction. It becomes necessary, therefore, to look into the exceptions, and see whether they apply to the answer in those points upon which the injunction rests. If they so apply, it furnishes an answer to the motion.

[3.] The presiding Judge, before whom the first motion was made to dissolve the injunction, seemed to think that the equity, upon which the injunction was granted, rested on the promise and undertaking, on the part both of Allen and Leak, that the claim of Lewis against Leak should be paid out of the surplus effects in Allen's hands of the firm property, after the settlement of the partnership of Allen & Leak. If this view of the complainants' equity was correct, then the exceptions which were filed to the amended answer were frivolous, and the injunction should have been dissolved—for this allegation is fully met and broadly denied by Allen, so far as he is concerned.

The equity of the complainant consists in this: that the debt which he owes Allen, and which he seeks to have satisfied out of the share of Leak in the surplus in Allen's hands, after the settlement of the partnership, in discharge of Leak's indebtedness to him, was contracted for and on account of the partnership property of Allen & Leak, and that Leak, his debtor, is utterly insolvent, and has no other means of paying this demand, and that he is not only willing but desirous that it should be satisfied out of this fund. *Wright vs. Bell*, Daniels' Rep. 95. *Edmoston vs. Fide*, 1 Paige, 641.

This being the case, it is obvious that Lewis is entitled to a full discovery from Allen as to the partnership property in his hands, and the residue to be divided between Leak and himself, after the settlement of the firm. Has he got this? One of the

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main items of joint stock property was lot No. 4, in square 33, in the city of Griffin. It was for the purchase of a part of this lot, that Lewis gave the note to Allen, which is the subject matter of this litigation. The bill alleges, that Allen has received between seven and eight thousand dollars as the proceeds of this real estate. Allen, after admitting in his original answer, that he took this property at the dissolution of the firm, and agreed to manage it in such manner as would make it pay the purchase money still due upon it, and other debts of the concern, as far as it would go, refuses to make any disclosures, in his amended answer, as to the proceeds, for the reason that, at the dissolution, he acquired the individual title to the property, and is, consequently, protected from other or farther answer respecting it.

Here it is most obvious, that so far from denying the equity of the bill in this particular, that enough is admitted, except as to the value, &c. to entitle the complainant to a decree. What if he did take an individual title at the dissolution! That will not protect him from accounting for the proceeds, according to his own admissions; for, inasmuch as these proceeds were to be applied to the extinguishment of the firm debts, it would, of course, leave just that much more to be finally divided between the copartners.

Again, the bill charges, that after paying off all the debts of the firm; there still remained in the hands of Allen, to be divided between Leak and himself, \$10,762 25, realized by him out of the partnership effects. Now, Lewis is certainly entitled to know what the true balance is—in other words, to a full account of the partnership as settled by Allen—the assets received, and from whom—the amount disbursed, and to whom.

It is true, that Allen seeks to excuse himself from answering more fully touching these matters, upon the ground, that in consideration of the individual appropriation which he made of the real estate, he agreed to pay certain specified debts, and released Leak from farther liability thereon. But this part of his answer is not responsive to the bill, but sets up affirmative allegations in opposition to, or in avoidance of the complainant's demand, and is of no avail in respect to such allegations, either on a motion to

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dissolve the injunction, or as testimony on the trial; on the contrary being replied to, the defendant will be just as much bound to establish them by independent proof, as the complainant is to sustain his bill. 4 *Paige*, 23. 8 *Pick.* 113. 2 *Johns. Ch. R.* 89. 15 *Monroe*, 125. 2 *Stewart*, 280. 15 *Vermont*, 93. 3 *Mason*, 378. 2 *Bibb*, 36. 2 *McCord's Ch. R.* 156. 12 *Peters*, 178. 6 *Monroe*, 620. 4 *Hen. & Munf.* 511. 1 *Munf.* 373. 1 *Gill. & Johns.* 272. 10 *Yerg.* 105. 5 *Dana*, 263. 2 *Sumner*, 487. *Story's Eq. Pl.* §849, a. 1 *Red. Eq.* 332. *Dev. Eq.* 364. *Dessau*. 588. 1 *Wash.* 224.

Let the judgment be reversed.

No. 22.—WM. PETERS, *alias* WILLIAM P. SIMPSON, plaintiff in error, *vs.* THE STATE OF GEORGIA.

[1.] An officer, arresting a criminal, is not authorized to charge "rail road fare" in his bill of costs; he is only authorized to charge *mileage*, and if the officer conveys the prisoner upon the rail road, it is upon his own responsibility.

[2.] Each County is bound by law to keep a good and sufficient jail for the safe-keeping of criminals, at the charge of the County, and if there is not such jail, and a guard is necessary for their safe-keeping, the expenses of such guard must be paid by the County, and not by the defendants who may be guarded.

[3.] When a defendant shall be convicted of a criminal offence, and cash funds belonging to him are in the hands of the arresting officer, judgment should be entered against the defendant for all costs legally due, and the money applied in satisfaction of that judgment, as provided by the Acts of 1820 and 1830, and the balance, if any, paid to the defendant or his authorized agent.

Burglary, in Henry Superior Court. Decided by Judge STARK.

At the April Adjourned Term, 1850, of Henry Superior Court,

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the plaintiff in error filed a plea of guilty to an indictment for burglary. The Solicitor General then moved the Court to tax in the bill of cost, against the plaintiff in error, the following items, to wit:

Prisoner's rail road fare, and other expenses.....	\$3 30
Bringing defendant before the Court 4 times.....	5 00
Serving nine subpoenas.....	5 62½
Guard conveying prisoner to jail.....	7 50
Guarding jail 115 days, at one dollar per day	\$115 00
Fees due Anderson and Henderson, witnesses subpoenaed by the State, living out of the County, but who were not examined before the Court.....	21 62

To which motion, counsel for the prisoner objected. The Court overruled the objection, except so far as to reduce the item for guarding the jail nine dollars and fifty cents, making John Bates, (another prisoner who occupied the jail nineteen days of the time during which the prisoner, *Peters alias Simpson*, was confined,) pay that sum, thereby dividing the expenses between the two. To which decision, counsel for *Simpson* excepted.

The Court having decided the items objected to in the bill of cost to be correct, legal and proper, counsel then moved the Court to permit them to traverse said items, for the purpose of showing, by proof, that the Sheriff, Guard and Jailor had charged for more days than the prisoner was confined in jail.

Which motion was overruled by the Court, as coming too late.

The Court then ordered the Sheriff to pay over to the County Treasurer, of Henry County, a sufficient amount of the defendants money in his hands to cover the bill of costs aforesaid, to which several decisions of the Court, the defendant excepted, and now assigns the same for error.

DOYAL & NOLAN, represented by CALHOUN, for plaintiff in error.

Sol. Gen. McCUNE, represented by GLENN, for defendant.

By the Court.—WARNER, J. delivering the opinion.

The first ground of error taken in this case is, to the decision of the Court allowing the bill of costs charged against the defendant.

Two of the items charged, we think, are objectionable. The officer charging costs should always show the authority of the law to exact its payment from the pocket of the citizen.

[1.] We are not aware of the provisions of any fee bill, regulated by Statute, which authorizes the officer to charge *rail road fare* in conveying a prisoner from one place to another. The officer is allowed to charge *mileage* for conveying a prisoner, and if he chooses to convey him on a rail road, he does so upon his own responsibility; still, he can only charge the *mileage* allowed by the Statute. From what point the defendant was conveyed, or what distance, the record does not inform us. The charge is too *indefinite* in another respect—"Prisoner's rail road fare and *other expenses*." What those *other expenses* were, we do not know. The defendant, who pays costs, is entitled to have the *specific* items, and the amount of each separately and distinctly stated.

[2.] The item for guarding the jail, we think, was improperly charged against the defendant. The first section of the Act of 1796 declares, that the Justices of the Inferior Courts of every County in this State shall maintain and keep in good repair, *at the charge of such County*, one sufficient jail, with sufficient apartments for the *safe keeping of criminals* and debtors, well secured, &c. *Prince*, 169. It is made the duty of each County to secure their own criminals, at the charge of the County, by having a good and sufficient jail for that purpose; and if they have not such a jail, and a guard is necessary, that guard should be paid by the County, and not by defendants. We are not aware of any *fee bill*, regulated by Statute, which authorizes such a charge to be made against a defendant; and those who charge costs, and exact its payment, as before remarked, must show the *authority of the law* to do so.

[3.] We are also of the opinion the Court below erred in or-

dering the Sheriff to pay the money, belonging to the defendant, over to the County Treasurer. After the conviction of the defendant, judgment ought to have been entered up against him for the amount of the costs legally due, according to the provisions of the Acts of 1820 and 1830. *Prince*, 446, 467. The money should then have been applied to the satisfaction of such judgment, and the balance returned to the defendant or his authorized agent.

Let the judgment of the Court below be reversed.

No. 23.—WILLIAM COLLINS, administrator, plaintiff in error, vs.
ANDREW TURNER, defendant.

[1.] When a writ of error is dismissed in this Court, no damages are recoverable in the cause in the Court below.

Motion, in Henry Superior Court. Decided by Judge STARK, April Term, 1850.

William Collins, as administrator of Sarah Guthrie, deceased, brought an action of trover, in Henry Superior Court, against Andrew Turner for the recovery of several negroes. The Jury returned a verdict in favor of the plaintiff for \$2100, to be discharged by the delivery of the property in a specified time. Turner, by writ of error, carried the case to the Supreme Court. At the February Term, 1850, of this Court at Macon, the writ of error was dismissed, upon the ground that the defendant in error, Wm. Collins, had no notice of the filing of the same in the Court below—there being no entry of service of a copy by the Sheriff or counsel of the party, as required by the 21st Rule of this Court. At the April Term, 1850, of Henry Superior Court, counsel for Collins moved the Court to enter up judgment against Tur-

ner for the sum of two hundred and ten dollars, as damages, it being ten per cent. on the amount of said verdict of \$2100.

The Court overruled the motion, and counsel for Collins excepted.

DOYAL & NOLAN, and CLARK, for plaintiff in error.

MOORE and GLENN, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The dismissal of a writ of error in this Court, confirms the judgment below. This is true by our own ruling. We dismiss a writ for defective pleadings. Our judgment, in that case, is not upon the merits of the cause as made in the pleadings. It is upon the sufficiency of the pleadings, and nothing else. The confirmation of the judgment is the legal effect of the dismissal of the writ. It is the conclusion which the law draws from that fact. Now, the damages are awarded for bringing up causes for delay only. Whether they are brought up for delay only, can only be determined by a hearing and judgment on the merits. If we neither hear nor adjudge a cause, how can we grant or withhold a certificate? The law, we are satisfied, does not contemplate the recovery of damages in such a case. The damages are recoverable when the judgment of the Court below is for a sum certain, and is *affirmed in the Supreme Court*, provided no one of the Judges will certify that the case was not brought up for delay only. The granting or withholding the certificate is a discretion to be exercised when the judgment, being for a sum certain, is affirmed by us. In this case there has been no affirmation of the judgment by this Court. It is not, therefore, a case for damages. See *law organizing Supreme Court*, sec. 5, 1 Kelly, 8.

Let the judgment be affirmed.

No. 24.—GEORGE W. LOGAN, plaintiff in error, vs. AARON S. GIGLEY, defendant in error.

[1.] A bond by an administrator, to convey real estate of his intestate, in contemplation of a sale under the *Ordinary's* order, is void, and is incapable of being enforced, either at Law or in Equity, as contrary to the policy of the Statute authorizing administrators to sell the real estate of their intestate.

Covenant on bond for titles to land, in Bibb Superior Court Tried before Judge STARK, January Term, 1850.

George G. Myers, as principal, and George M. Logan, as security, on the third day of January, 1848, executed to Aaron S. Gigley their bond, in the penalty of eight hundred and fifty dollars, conditioned to be void, when the said Myers, as administrator of the estate of Charles T. England, deceased, should make or cause to be made, as such administrator, good and sufficient warrantee titles to lot No. 6, in square 36, according to the plan of the city of Macon, in the County of Bibb, unto the said Gigley, his heirs and assigns; as soon as the same could be done according to law.

Upon this bond, the defendant in error, Aaron S. Gigley brought his action in Bibb Superior Court against George M. Logan and George G. Myers.

On the trial the plaintiff proved, by Col. Robert V. Hardeman, that he, as the agent of the plaintiff, a short time before the commencement of the suit, demanded from Logan titles to said property, in conformity to the terms of the bond. Logan refused to make titles, and said that Myers was gone to some of the northern States, and resided out of Georgia.

Counsel for defendant then moved the Court for a non-suit upon the following grounds:

Because Myers, the principal in the bond, and a joint and several undertaker with Logan, had not been served, but was shown to be beyond the jurisdiction of the Court.

Because the testimony showed, that the undertaking in th

bond was illegal and void, and that the obligors and obligee were cognizant of it, and all *participes criminis*, in this, that it was an obligation on the part of Myers, as administrator of Charles T. England, to sell the real estate of deceased, contrary to the Statutes regulating the sale of intestate's real estate.

Because, to sell real estate of intestate by an administrator, privately, and without an order of the Court of Ordinary, as regulated by Statute, is an illegal and void contract, and no action can arise in favor of an obligee in a bond, which shows, on its face, that it was given to enforce and carry out such a sale.

Because it is contrary to the policy of the law to allow a recovery on bonds of this kind, because it enables the administrator and purchaser to perpetrate a fraud on the estates of intestate, and the policy of the law requires that the whole undertaking, bond and all, should be declared null and void.

Because the contract, as shown from the evidence, is null and void.

The Court overruled the motion for a non-suit, and counsel for defendant excepted.

POWERS and WHITTLE for plaintiff in error.

HARDEMAN, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We fully subscribe to the doctrine, as ruled by the Supreme Court of New York, in *The Overseers of Bridgewater vs. The Overseers of Brookfield*, (3 Cow. 299,) and in *Herreck vs. Grow & Brown*, (5 Wend. 579,) namely: that a bond by an administrator, to convey real estate of his intestate, in contemplation of a sale under the *Ordinary's order*, is utterly void and incapable of being enforced, either at Law or in Equity, and that it is against the policy of the law to permit the authority, conferred by the *Ordinary*, to be influenced or controlled by any previous contract.

In the latter case, it was well remarked by Ch. J. Savage, that

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by Statute, administrators must sell at auction, and they can sell in no other manner. The highest bidder must have the property, and to him the administrators must convey. If the bidder at public auction, therefore, offer more than the administrators have agreed to sell for, they must forfeit and pay the difference out of their own pockets, according to their contract. They have every inducement, therefore, to discourage bidding, whereas, their duty requires them to sell at the highest price. Such a contract, consequently, is highly improper, and a violation of the duty of the trustee.

But, *non constat*, that Myers' and Logan's bond was given to Aaron S. Gigley, to sell and convey the real estate of Charles T. England, deceased, the intestate of Myers. It does not so purport on the face of it. It is an obligation of Myers, as administrator of England, to make, or cause to be made, good and sufficient warrantee titles to lot No. 6, in square 36, according to the plan of the city of Macon, as soon as the same could be done according to law. Still, I repeat, this lot is not alleged, in the bond, to be the property of England's estate. It may not be so, and, in that event, the bond would be a mere *personal* undertaking on the part of Myers, and the addition of *administrator* to his name, be considered mere surplusage.

There being no other evidence then before the Court, but the instrument itself, and the testimony of Col. Hardeman, demanding titles, instead of moving for a non-suit, the defendant's counsel should have gone on to the Jury, and supported his plea by evidence, and then asked the instructions of the Court to the Jury, that the bond was contrary to the policy of the law, and consequently void. Upon the *plea*, the case is with the defendant in the Court below—upon the *proof*, with the plaintiff.

The judgment must, therefore, be affirmed.

No. 25.—L. M. WILEY, PARISH & Co. plaintiffs in error, vs. C. & G. H. KELSEY and HALSTED and others, defendants.

[1.] The judgment of a Court of competent jurisdiction, over the subject matter, is conclusive as to the facts which it decides, until reversed or set aside, and such judgment cannot be collaterally impeached or contradicted by evidence which such judgment declares to have been *cancelled and annulled*.

Rule against Sheriff, and motion to set aside *fi. fa.* in Houston Superior Court. Decided by Judge STARK, April Term, 1850.

At the April Term, 1839, of Houston Superior Court, L. M. Wiley, Parish & Co. obtained judgment against T. & S. Williams, for the sum of \$1753 96 cents, principal. Execution issued therefor on the 18th day of May, 1839.

The correct amount was inserted in the face of the execution, but on the back it was for \$753 96—the same entry was made on the execution docket. The only entry which appeared upon the execution, was a receipt, in the hand-writing of the late Judge Tracy, for \$186 46 cents—but not signed by him—dated January 25th, 1840.

At the October Term, 1846, and on the 28th day of the month, an order was obtained, which recited that it appeared to the Court, by the statement of plaintiff's counsel and an inspection of the record, that the original *fi. fa.* had been issued by the Clerk, through mistake, for \$753 96 cents, instead of \$1753 96 cents, and ordering that the said *fi. fa.* so erroneously issued, be cancelled and annulled, and a new one for the correct amount be issued; and, also, directing the late Sheriff, George M. Duncan, to enter upon the new *fi. fa.* any levy or payment which may have been made upon the old one; and accordingly, upon said *fi. fa.* George M. Duncan made several entries, the last of which was made sometime about the 1st of January, 1840.

At the October Term, 1846, of said Court, a controversy arose as to the distribution of certain money arising from the sale of T. & S. Williams' property, between the plaintiffs in this *fi. fa.* and

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other judgment creditors of T. & S. Williams, when an issue of payment was made, and tendered upon the *fi. fa.* of Wiley, Parish & Co. at the instance of C. & G. H. Kelsey and Halsted, which was, at the April Term, 1847, withdrawn, and at said term, on motion of counsel, the *fi. fa.* of Wiley, Parish & Co. was set aside, on the ground that it was dormant, and the money then in the hands of the Sheriff ordered to be paid to the *fi. fa.* of C. & G. H. Kelsey and Halsted. To which decision exception was taken, and the same was reversed by the Supreme Court; and, subsequently, money was paid upon said *fi. fa.* by order of the Superior Court, had at October Term, 1848.

At the April Term, 1850, of Houston Superior Court, a rule was moved against the Sheriff to pay over money arising from the sale of T. & S. Williams' property, to the *fi. fa.* in favor of Wiley, Parish & Co. when counsel for defendants in error moved the Court to set aside said *fi. fa.* upon the following grounds:

1st. Because said *fi. fa.* bears date the 28th day of October, 1846—more than seven years after the signing of the judgment from which it issued; that it is attested by Angus M. D. King, as Judge, who was not, at that time, Judge, and signed by Lewis J. Jordan, as Clerk, who was not, at that time, Clerk of this Court.

2d. Because said *fi. fa.* is not an *alias fi. fa.* and contains entries prior to its date—the original *fi. fa.* having been, by order of Court, set aside, cancelled and annulled by order of this Court.

3d. Because the judgment from which said *fi. fa.* purports to have issued was dormant—said *fi. fa.* not having issued within seven years from the time of signing said judgment.

4th. Because the judgment from which said *fi. fa.* was issued is and was dormant before the said *fi. fa.* was issued—the original *fi. fa.* issued therefrom not having any entry made thereon by the proper officer for more than seven years from the time it was issued: and farther,

Because the said original *fi. fa.* was not erroneously issued, but was correctly issued, and that the said original was dormant, and the said established *fi. fa.* was erroneously established, and

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contained entries which were not on the original *fi. fa.* and said entries were erroneously placed on the said established *fi. fa.*

Which motion the Court sustained, and ordered the *fi. fa.* of plaintiffs to be set aside as absolutely null and void, and the money in the hands of Sheriff to be paid to the *fi. fas.* in favor of the defendants, according to their priority. To which decision counsel for plaintiffs excepted, and have assigned error thereon.

POWERS & WHITTLE, and HINES, for plaintiffs in error.

KILLEN, WARREN and GILES, for defendants in error.

By the Court.—WARNER, J. delivering the opinion.

The facts of this case are briefly as follows: At the October Term of Houston Superior Court, in the year 1846, it was ordered and adjudged by the Court, upon the evidence of the plaintiffs' counsel, and an *inspection of the record*, that the Clerk had issued an execution upon a judgment rendered in favor of L. M. Wiley, Parish & Co. vs. T. & S. Williams, through mistake, for the sum of \$753 95, instead of the sum of \$1753 95; and it was farther ordered and adjudged by the Court, that the execution so erroneously issued, be and the same is hereby *cancelled and annulled*, and that the Clerk forthwith issue a *fi. fa.* for the correct amount of the judgment, *nunc pro tunc*; and, also, that the late Sheriff, George M. Duncan, do enter upon said *fi. fa.* so to be issued, any levy or payment which may have been made or received upon the execution *erroneously* issued as aforesaid.

The execution so issued in accordance with the judgment of the Court, has claimed money in the Court below, and has once been before this Court, when it was adjudged not to have been a *dormant execution*.

At the last term of the Court, the execution established by the judgment of the Court, as before stated, was placed in the Sheriff's hands, to claim money arising from the sale of the defendants' property, when a motion was made to set it aside, upon the ground that an execution, alleged to have been the original

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execution, was produced in Court; which had been issued for the *correct* amount, and was *dormant* under the law, and the Court sustained the motion, and set aside the *fi. fa.* so issued in accordance with the judgment of the Court, made at October Term 1846. The only question involved is, whether the judgment of the Court, rendered in October, 1846, can be attacked and set aside in this *collateral* manner.

The only effect of the evidence offered is, to show that the Court was *mistaken* as to the facts when the judgment was rendered in 1846, and that the judgment was *erroneous*. In other words, the evidence now offered *expressly contradicts* the judgment rendered in 1846. The judgment rendered in 1846 declares, that the execution issued for the *wrong* amount. The evidence now offered is for the purpose of showing that there was *no mistake*, and that the execution was originally issued for the *correct* amount, and to prove that fact, a paper is offered which is *said to be* the original execution.

Admit the paper offered in evidence to be the *original* execution, and what effect can it have as evidence? The judgment of the Court, in 1846, declares it to be *cancelled and annulled* and so long as that judgment remains *unreversed*, it is difficult to perceive upon what legal principle it can be *contradicted*, and especially how it can be contradicted by offering a paper in evidence, which, by the judgment of a Court of competent jurisdiction, has been adjudged to have been *cancelled and annulled*.

Although the judgment may have been *erroneous*, yet it is conclusive as to the *facts* which it purports to decide—it being the act of a Court having competent jurisdiction over the *subject matter*—it cannot be contradicted or attacked, in the manner proposed in the Court below. *Stark vs. Woodward*, 1 Nott & McCord Rep. 329. *Lyles vs. Brown*, Harper's Law Rep. 31. *Geyer vs. Aguilar*, 7 Tenn. Rep. 691. *Sims & Wise vs. Slocum*, 8 Cranch 298. 1 Cond. Rep. U. S. 541. We are of the opinion the Court below erred in its judgment, in allowing the judgment rendered in 1846, establishing the execution, to be impeached *collaterally*, by the evidence offered for that purpose.

Let the judgment of the Court below be reversed.

No. 26.—BRINKLEY BISHOP, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

- [1.]** A witness may be interrogated as to the state of his feelings toward a party, in order to show the bias under which he testifies; it is not admissible, however, to inquire into the cause of his hostility.
- [2.]** When the dispute is as to localities, a diagram, drawn in accordance with the testimony of a witness, may be submitted to the Jury without having been first exhibited to the witness whose evidence it contradicts.
- [3.]** A new trial will not be granted, in consequence of the admission of illegal testimony, where such testimony was suffered to go to the Jury without objection, either on its introduction or in the argument of the case.
- [4.]** The affidavit of a Juror will not be received to impeach his verdict.
- [5.]** When a Juror is put upon triers, it is not proper for *counsel* to ask him any other questions than those propounded by the Act of 1843.
- [6.]** Where the offence has been recently committed, and the party accused imprisoned during the whole time which has intervened between his arrest and trial, it is good cause of continuance in a capital case, at the first term after the bill is found, that the defendant cannot come safely to trial on account of the excitement existing in the public mind against him. And the affidavit of the prisoner, when made and filed in terms of the law, cannot be contradicted or traversed, either by a cross examination or *aliunde* proof.
- [7.]** It is ground for a new trial, if one of the Jurors, before the trial, makes declarations which clearly indicate that he is not above all exception, and that his opinion is not a hypothetical one—dependent upon the whole proof—but formed, exclusively, in reference to the evidence which shall be adduced on the part of the prosecution.

Indictment for murder, in Bibb Superior Court. Tried before Judge STARK, January Term, 1850.

The defendant was indicted at the January Term, 1850, of Bibb Superior Court, for the killing of one Turner Smith, on the eighth day of December, 1849. The cause came on for trial at the same term of the Court, when the defendant moved the Court for a continuance of his cause, upon the ground stated in his written affidavit, to wit: "That he cannot go safely to trial, because such is the excitement in the public mind, and so excited is public feeling against him, as he has been informed and believes, that he has more to fear, and does fear that he cannot obtain a

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fair trial." In answer to questions propounded by the State on a cross examination, defendant stated, that he made the statement, contained in his affidavit, from information received from persons while he was in jail; that he had been confined in jail since the 8th day of December; that he remembered the names of but two persons who gave him information on the subject. One was Patrick Cunningham, who told him the day before, "that there was a heavy weight against him." The other was Hezekiah McKinney, who told him sometime after his confinement, "that public opinion was against him." Defendant farther stated, that he did not know that any one had stated to him that public opinion was so excited that he could not have justice done him.

The Court overruled the motion for a continuance, and ordered the trial to proceed.

In the progress of the trial, John P. Lamar was introduced as a witness by the defendant. Upon his cross-examination, in answer to a question propounded by the State, witness stated that "he was not on friendly terms with Turner Smith, the deceased." Counsel for the defendant then proposed to ask the witness as to the reasons of his hostility to the deceased, which was overruled by the Court.

Richard Bassett, a witness for the defendant, testified as to the localities of the place at which, and the relative situation of the parties at the time the killing was perpetrated.

By way of rebuttal to the testimony of Bassett, the State introduced a "diagram," based upon the testimony of _____ a witness for the State, without having first submitted the diagram to Bassett—said diagram being at variance with the testimony of Bassett as to the place and position of the parties at the time the killing was done.

The Jury returned a verdict of guilty, with a recommendation of the prisoner to the mercy of the Court.

Counsel for the defendant then moved the Court for a new trial, upon several grounds, of which the decision of this Court renders it only necessary to state the following:

1st. Because the Court refused to allow counsel for prisoner

to ask John P. Lamar why he was unfriendly to the deceased, after the counsel for the State had been permitted to ask him if he was unfriendly.

2d. Because the Court allowed a diagram to go in evidence to contradict the testimony of Bassett, which was not exhibited to Bassett.

3d. Because David Smith, Jr. one of the Jurors who tried the cause, was induced to agree to the verdict by the persuasion of his fellows, by misrepresenting to said Juror the effect of the verdict rendered, he being assured by some of his fellows that a general verdict of guilty, with a recommendation to the mercy of the Court, would authorize the Court to commute the punishment from death to imprisonment in the penitentiary.

4th. Because the Court erred in refusing the counsel for prisoner the right to examine the Juror when put upon triors.

5th. Because the Court erred in refusing to grant a continuance of the cause to the prisoner, upon the grounds stated in his affidavit, as to the excitement existing in the public mind against him.

6th. Because Madison Malsby, one of the Jurors who tried said cause, was biased and prejudiced against the defendant; and so far prejudiced, as to be unable to do justice to the defendant.

Upon the hearing of the motion for a new trial, the defendant submitted the affidavit of David Smith, Jr. in which he stated that he was induced to agree to the verdict for the reasons stated in the third ground taken in the motion.

Defendant also submitted the affidavits of Henry B. Page, James B. Cooper and Zachariah Holloman, who stated, "that they heard Madison Malsby, one of the Jurors who tried the cause, on the Saturday before he was impaneled on the Jury, say that if he was on the Jury, he would hang Bishop and burn Smith (who was also indicted, but not put upon his trial.)"

Counsel for the State then submitted the affidavit of Madison Malsby, the Juror, in which he stated, "that in a conversation with Page, Cooper and another individual by the name of Keel, on the Saturday previous to the trial, he said that if such testimo-

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ny was given before the Court, as he had heard could be brought in, he would stay there until hell freezed over, or hang them," (meaning Bishop and Smith.) He further stated in his affidavit, "that on the trial of the cause, he acted under neither bias nor prejudice, and was solely governed by the law and the testimony delivered on oath upon the trial before the Court, and that he was put upon the Jury without ever having been placed upon his *voire dire*, or questioned as to his competency as a Juror by the prisoner or the State. Deponent further swears, that in a conversation with James B. Cooper, in the presence of Francis Wells, on Sunday last, he told Cooper that he was summoned, but did not want to serve on the Jury, for if they (meaning the prosecution) made such proof, as he understood they could make, he would stay there until he rotted, or until hell burned down, but he would hang them."

The affidavits of Ardin Keel and Francis Wells were also submitted by the State to corroborate and sustain the statements of Malsby, the Juror.

The Court overruled the motion for a new trial, and counsel for the defendant excepted.

THOMAS P. STUBBS and WM. K. DEGRAFFENREID, for plaintiff in error.

Sol. Gen. McCUNE, HALL, and POE & NISBET, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The first error complained of in the proceedings of the Court below in this cause is, that the Court refused to allow counsel for the prisoner to ask John P. Lamar, a witness for the defendant, why he was unfriendly to the deceased, after the State's attorney had been permitted to inquire of him if he was not inimical to the deceased. The question asked the witness was properly propounded for the purpose of showing the bias under which he testified; but it does not occur to us, what good or le-

gal object could have been subserved by instituting an inquiry into the cause of the hostility entertained by the witness toward the deceased. It may have answered, to be sure, to have justified him, in the opinion of the Jury and others, but not in any way to elucidate the truth of the issue which they were trying; on the contrary, by entering into particulars as to the origin of the feud, statements might have been made which could not be rebutted, and thus improperly have prejudiced the minds of the Jury against the prosecution. We do not deem this assignment of error sufficient to affect the judgment.

[2.] It is insisted, in the second place, that the Court erred in allowing a diagram to go before the Jury, to contradict the testimony of Bassett, which was not exhibited to the witness.

[3.] It appears from the record, that this testimony was suffered to go to the Jury, without objection, either on its introduction or in the argument of the case. The illegality, then, is waived, and a new trial will not be granted in consequence of its admission. Had this proof been objected to, it might not have been pressed, and if pressed, might have been excluded by the Court. It will never do to permit a prisoner to hear illegal testimony without objection, and then assign its introduction as error; by such indulgence, advantage will always be taken of the prosecution. 4 *Shep.* 187. 4 *Humph.* 27. 5 *Blackf.* 436.

But apart from this rule, upon what principle was it necessary to exhibit the diagram, submitted to the Jury, to Bassett? He had testified to the localities where the homicide was committed. Another witness is introduced, who gives a different statement, and a plat is made out in accordance with his evidence. It is not the *paper*, but the *proof* upon which it is made out, that contradicts Bassett. Had the prisoner considered it material, Bassett could have been called back and re-examined as to this matter of discrepancy. This, then, cannot be regarded as error.

[4.] It is next urged as error, that the Court refused to receive the affidavit of David Smith, Jr. one of the Jurors who tried the cause, to impeach the verdict. He does not deny the guilt of the accused, but states, that he was induced to agree to the verdict.

by the persuasion of his fellow-jurors, and by their misrepresentations as to the effect of the verdict.

In *Monroe's Case*, (5 *Kelly & Cobb*, 141,) although the point was not directly made, I ventured the opinion, that while the Jury would be heard in their vindication, they would not be allowed to impeach their own verdict. The argument now submitted has satisfied me of the soundness of that conclusion. I admit that the ancient law and practice was the other way. *Phillips vs. Fowler*, 1 *Barnes*, 441, 8 *Geo. II.* *Parr vs. Seames*, 1 *Barnes*, 438. *Aylett vs. Jewell*, 2 *Wm. Black*, 1279. *Bellish vs. Arnold*, *Bunb.* 51: And in *Smith vs. Chetham*, (3 *Caines*, 57,) *Spencer*, J. says, "on examining the English authorities, prior to the revolution, it appears to me that the information of Jurors, as to what passed, may be received."

I will not refer to the case of *Price vs. Powers*, (1 *Keble*, 811,) which was a decision to the contrary, as early as the reign of *King Charles II.* since Mr. Justice *Park*, after hearing Lord *Kenyon's* censures upon *Keble's Reports*, burned his copy, "not thinking it worth while to keep a refuse book in his library;" and Lord *Campbell* calls *Keble* "a drowsy sergeant, known only for some bad law reports." Still, it is very certain that before the epoch of our revolution, and at least as early as 1770, the doctrine in England was distinctly ruled the other way, and has so stood ever since. In *Rex vs. Almon*, (5 *J. Burrows*, 2686,) tried that year on a motion for a new trial in the King's Bench; Sergeant *Glynn* prayed that the affidavit of Mr. *Mackworth*, one of the Jurors, might be read, to show that he rendered his verdict under a mistake; but the emphatic reply of Lord *Mansfield* was, "you know it cannot be read."

In the subsequent case of *Vaire vs. Delaval*, (1 *Term R.* 11,) Lord *Mansfield* said, the Court cannot receive an affidavit from any of the Jurymen themselves, as to their misconduct; but in every such case, the Court must derive its knowledge from some other source.

Concede the most, then, that can be claimed, in May 1776, when our Adopting Statute took effect, the law in England, to borrow a term from geology, was in a *transition* state, and that

being the case, we are at liberty to exercise our own discretion in respect to it.

It is admitted, that notwithstanding a few adjudications to the contrary, (*Warner vs. Roberson*, 1 Root, 194; *Gunnell vs. Phillips*, 1 Mass. Rep. 541; *Shobe vs. Bell*, 1 Rand. 39; *Elledge vs. Todd*, 1 *Humph.* 44,) that it is now well settled, both in England, and with the exception of Tennessee, perhaps, in every State of this confederacy, that such affidavits shall not be received, and, we believe, upon correct reasoning. If the doctrine contended for was once established, but few verdicts could stand. It would open the widest door for endless litigation, fraud and perjury, and is condemned by the clearest principles of justice and public policy.

We reject this ground, then, as totally insufficient to obtain a new trial.

[5.] The next ground of error assigned is, the refusal of the Court to suffer the counsel for the prisoner to examine the Juror when put upon triors.

By the Act of 1843, two questions, and, as we think, *two only*, are allowed to be propounded to the Juror, upon his *voire dire*, by counsel, to test his competency; and, notwithstanding his answer, the State, or the prisoner either, has the right to put such Juror upon his trial in the manner pointed out by the Common Law, and to prove such Juror incompetent; but this must be done, we apprehend, by *aliunde* testimony. We would not be understood as denying the right of the triors to interrogate the Juror.

This ground, therefore, cannot be supported.

[6.] But it is urged, that the Court erred in overruling the motion for a continuance—the prisoner swearing that the excitement against him was such as to prevent a fair trial.

In *Howell vs. The State*, (5 Ga. R. 53,) this Court intimated that this would be a good ground of continuance, at least at the first term of the Court, and when the offence had been but recently committed. Considering the facts of this case, that this was the first term of the Court after the indictment was found; the prisoner put upon his trial the next month after the offence

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was committed ; that he was imprisoned in jail during the whole of the intervening time ; the known excitement which usually exists upon the perpetration of a great crime ; and that the venue cannot be changed—we are unwilling to relax the rule and bring parties into trial, under such adverse circumstances. And when it is recollected, that a half year's close confinement will be the consequence of this postponement, it is sufficient security, perhaps, that this indulgence will not be abused. But let the depravity of the criminal be ever so great, and the fact of his guilt ever so apparent, if he offers to the Court sufficient reasons, he is entitled to obtain a postponement of his trial.

In a case of murder, committed in Newcastle-upon-Tyne, which had created great excitement, and it appeared that the Jurors were chosen from within a circle of fifteen miles round Newcastle, *Alderson and Parke*, BB. postponed the trial until the following Assizes. *Bolan's Case, Newcastle Spring Assizes, 1839.* The same doctrine is also recognized in *Jollyfer's Case*, (4 T. R. 285.) And how beautifully is this principle illustrated in that humane provision of British jurisprudence, which, adjudging an attack upon the King to be parricide against the State, and that the Jury and witnesses, and even the Judges are the children, deems it fit, on that account, that there should be a solemn pause before proceeding to judgment—a legal *quarantine* before trial—lest the mind should be subject to the contagion of partial and improper affections. What a sublime spectacle of justice, to witness this statutable disqualification of a whole nation for a limited period !

But it is said, that upon a cross-examination of the prisoner by the Court, as to the sources of his information, that the written affidavit which he made, was so far qualified or discredited as to authorize its rejection ; but we think that this proceeding was irregular. Had the accused submitted himself to an oral examination, it might have been otherwise ; but having filed his affidavit in terms of the law, it was not competent to interrogate him farther.

Mr. *Roscoe*, in his *Treatise on Criminal Evidence*, says, where a fair and impartial trial cannot be had in the County where the

venue is laid, the Court of Kings Bench, (the indictment being removed thither by *certiorari*,) will, upon an affidavit stating that fact, permit a suggestion to be entered on the record, so that the trial may be had in an adjacent County. Good ground must be stated in the affidavit for the belief that the trial cannot be had. *The suggestion, however, need not state the facts from which the inference is drawn that a fair trial cannot be had.* Citing *Hunt's Case*, 3 B. & A. 444, (31 Eng. Com. L. Rep. 342.) And this suggestion, when entered, is not traversable. 1 Chitty's Crim. Law, 201. Roscoe, 236.

Believing these principles to be strictly analogous, the disallowance of this motion for a continuance cannot receive our sanction.

[7.] The only remaining question is, as to the competency of Madison Malsby as a Juror.

The general rules by which the fairness of a Juror is to be tried, are so fully stated in *Monroe's Case*, that we do not care to recapitulate them here. The affidavits submitted to the Court, by the defendant in support of his application for a new trial, establish, conclusively, the unfitness of the Juror. Nor do we think him relieved by his own statement. It is contended, that the opinion which he expressed, was predicated upon a hypothetical case; but, from an attentive consideration of all the evidence, we think otherwise. If it amounted to nothing more than the expression, simply, of an opinion upon a given state of facts, we could not only excuse the individual, but even commend him for giving utterance to his abhorrence of a great crime, supposed to have been wantonly and wickedly committed against the peace and welfare of the community of which he was a member. On the contrary, the proof shows a determination to look to the testimony *alone*, which would in-culpate, and not to that which would ex-culpate the defendant—to believe that which would convict, and to disregard that which would acquit the prisoner. Such impressions would not be easily removed, whatever facts may have been proven in favor of the accused. Who can doubt but that they would have operated injuriously to the accused? It is the pride of the Constitution of this country,

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that all causes should be decided by Jurors, from whose breasts are excluded all bias and prejudice. To break down any of these safeguards, so wisely erected, and to suffer Jurors to decide upon the life and liberty of the citizen, whose minds are poisoned by passion or prejudice, would be to stab the upright administration of justice in its most vital parts. We cannot hesitate, therefore, to pronounce Madison Malsby an incompetent Juror, and that the Circuit Court ought to have awarded a new trial to the defendant on that account.

The judgment of the Court below must, consequently, be reversed and the cause remanded, and a new trial granted by the Superior Court of Bibb County.

No. 27.—GEO. W. TOWNS, Governor, for the use of P. A. Clayton, plaintiff in error, *vs.* JOHN SPRINGER *et al.* defendants.

[1.] A judgment rendered by a Court without jurisdiction, is a mere nullity, and may be so held wherever and whenever and in whatever way it is sought to be used as a valid judgment.

Rule absolute for a new trial. Granted by Judge STARK, at July Term, 1850, of Bibb Superior Court.

The plaintiff instituted an action of debt against the defendant upon his bond, as former Sheriff of Bibb County, for the recovery of money alleged to have been collected by the defendant, as Sheriff, upon a mortgage *fi. fa.* issued from the Inferior Court of said County, in favor of the usee, against one James T. Rivers, for the sum of three hundred and fifty dollars, principal, and sixteen dollars and thirty-three cents, interest, up to the 1st day of May, 1838.

The cause came on to be tried upon the appeal, at July Term,

1849, when the Jury returned a verdict for the plaintiff for seven hundred dollars and fifty-one cents.

Whereupon counsel for the defendant moved the Court for a new trial, upon the following grounds :

1st. Because the Court erred in admitting in evidence, for the plaintiff, a rule absolute in favor of Philip A. Clayton against John Springer, at the November Term, 1847, of Bibb Superior Court, founded on a mortgage *fi. fa.* from Bibb Inferior Court, this Court having no jurisdiction in said case.

2d. Because the Court erred in instructing and charging the Jury, that the said rule, against John Springer, was sufficient evidence to authorize the Jury to find for the plaintiff and against the securities of the said John Springer.

3d. Because the Jury found their verdict for the plaintiff without evidence, and contrary to evidence.

4th. Because the Jury found contrary to law.

5th. Because the verdict of the Jury is not in terms of the law, and because it is for too large an amount, and because the principal and interest are united in one sum.

At the July Term, 1850, Judge Stark heard and made absolute the rule *nisi*, and granted a new trial, "on the ground that the Court erred in admitting said rule absolute in evidence, because the Superior Court had no jurisdiction over an execution issued from the Inferior Court, and as the rule did not show that the Superior Court had jurisdiction, the rule absolute was a nullity and void, and therefore erroneously admitted in evidence."

To which decision of the Court, counsel for plaintiff excepted.

STUBBS and LESTER, for plaintiff in error.

COLE, for defendants in error.

By the Court—NISBET, J. delivering the opinion.

[1.] It appears from the statements in the plaintiff's declaration, that the *fi. fa.* upon which the rule against the Sheriff was moved, issued upon the foreclosure of a mortgage, and was re-

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turnable to the Inferior Court. The rule was moved before the Superior Court, and was there made absolute. The question is, was that order absolute or judgment of the Superior Court admissible on the trial, to charge the surety of the Sheriff. We think it was not, because it is a mere nullity. It is a nullity, because the Court which rendered it had no jurisdiction over the Sheriff upon a rule founded on an execution returnable to the Inferior Court. If a nullity, it is available to the party procuring it for no purpose, consequently it is not available to him, as evidence in this suit against the Sheriff's surety, to show a breach of his bond. The assailability of a judgment of a Court of competent jurisdiction for irregularity is one thing—of a judgment of a Court not having jurisdiction, for the want of jurisdiction, is a very different thing. In the latter case, the judgment may be impeached whenever and wherever it is sought to be used as a valid judgment, no matter in what way it is proposed to be used. To make a judgment, *in personam*, valid, the Court which renders it must have jurisdiction of the subject matter, and of the person against whom it is rendered. In this case, the Superior Court had no jurisdiction over the Sheriff. He is amenable to the Inferior Court upon the process which issues from that Court. That Court has jurisdiction over its own processes. The Sheriff is the officer of that Court, as well as of the Superior Court. He is bound to execute its processes. If he does not, he is in contempt of that Court. He is bound to obey its orders, and if he does not, he is in contempt, and if in contempt, that Court alone has the power of punishing him. As he is not in contempt of the Superior Court for not obeying a process from the Inferior Court, the Superior Court has no power to punish him for not obeying the order absolute on the rule. *Bethune vs. Bonner*, 2 Kelly, 169. 9 Cow. R. 229. 15 Johns. R. 141. 4 Ibid, 354. 3 Wils. R. 188. 6 Wheat. R. 204. 2 Bay. R. 182. 7 Wheat. 38. *Dearing vs. The Bank of Charleston*, 5 Ga. R. 497.

This was the only question insisted upon in this case.

Let the judgment be affirmed.

No. 28.—THOMAS BRYANT, plaintiff in error, vs. HARRISON HAMBRICK, defendant.

- [1.] A declaration or answer may be amended at any time before the case is finally submitted to the Jury, if the principles of justice require it.
- [2.] The judgment, and not the execution issuing thereon, is the proper subject matter of set-off.
- [3.] In an action on a bond for titles, the measure of damages is the value of the land at the time when the title should have been made.
- [4.] By making a proper case in Equity, a vendee, legally evicted, will be entitled to recover the value of the beneficial and permanent improvements put upon the premises.

Debt on bond for titles to land, in Troup Superior Court.
Tried before Judge HILL, May Term, 1850.

This was an action of debt brought upon a bond made by Hambrick, the defendant in error, to Bryant, the plaintiff in error, in the penalty of five hundred dollars, and conditioned to be void when Hambrick should make good and sufficient titles to Bryant to lot of land No. 3, in the 12th district of Merriwether County.

On the trial of the cause in the Court below, the plaintiff proved that he purchased the land of defendant for two hundred and fifty dollars; that he had gone into possession, and made improvements worth \$400, and that the land had increased in value to \$450, making the premises worth \$850; that in 1846, he was evicted from the land, in favor of a third person, by due process of law.

The defendant then offered in evidence an execution against plaintiff and one Obadiah L. Bryant, for the sum of \$121 50, principal, with interest from 31st August, 1844, to the admission of which, counsel for plaintiff objected, on the ground that there was no plea to authorize its admission. The Court sustained the objection, and defendant's counsel then moved the Court to amend his plea, instantler, by inserting a plea of set-off, to which counsel for plaintiff objected. The Court overruled the objection, allowed the plea to be amended and the execution to be

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read to the Jury as a set-off. To all of which, counsel for plaintiff excepted.

The Court charged the Jury, "that the measure of damages in this case was the purchase money, with interest from the time the notes given for the land became due, and that they could not take into consideration the value of the land nor the improvements." To which charge, the counsel for plaintiff excepted.

And upon these several exceptions has assigned error.

W. DOUGHERTY, for plaintiff in error.

BULL and FERRELL, for the defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We think the Circuit Judge was right in allowing the defendant's plea to be amended, but that he erred in permitting the execution to be read to the Jury as a set-off.

[2.] Instead of the *fi. fa.* the judgment, upon which it issued, should have been tendered in evidence.

[3.] Nor do we concur in the opinion, that the purchase money, with the interest thereon, is the measure of damages in an action on a bond for titles to land. Such a rule would tempt the vendor, in any case where the property increased in value, to violate his contract. The proper criterion is, the value of the land at the time when the title should have been made. *Davis and Smith* (5 Kelly & Cobb, 274,) was for the breach of a covenant of warranty of title, and, therefore, distinguishable from the present case.

[4.] If the vendee and obligee is not content with this measure of compensation, he may go into Equity and compel a specific performance of the contract. Or if that is rendered impossible, as in the present instance, for want of title in the vendor, he may, by making a proper case, move in a Court of Chancery, and have a suitable allowance made him for his improvements. See *Martin vs. Atkinson*, 7 Cobb, 228.

Judgment reversed.

No. 29.—ROBERT F. McGEHEE, plaintiff in error, vs. JAMES B. RAGAN, &c. defendant.

[1.] Letters of administration must be granted by the Court of Ordinary, at the next term of the Court immediately succeeding the publication of the thirty days' notice of the applicant and citation by the Clerk, unless the application is regularly continued by the action of the Court, from time to time, and then the parties in interest are bound to take notice of such continuance.

Motion, in Troup Superior Court. Decided by Judge HILL, May Term, 1850.

Abraham B. Ragan applied to the Clerk of the Court of Ordinary of Troup County, for letters of administration on the estate of John Omara, deceased. Citation and notice were duly issued and published. At the term for his qualification, the said Abraham B. Ragan was unable to give the security required by law, and did not make application to the Court. The application to the Clerk remained in this position for several terms of the Court. At the March Term of the Court, 1849, by an agreement with Abraham B. Ragan, Robert F. McGehee, the plaintiff in error, came forward, gave the required bond and security, and was qualified as the administrator of the said John Omara. Twelve months after this appointment, the defendant in error, in right of his wife, Sarah Ragan, formerly Sarah Omara, moved the Court of Ordinary to revoke the letters of the said Robert F. McGehee, on the ground that he was not the next of kin to the deceased, and that no notice or citation of his application had been published.

The Court of Ordinary granted the motion, and revoked the letters. An appeal was taken to the Superior Court, by the plaintiff in error, and the judgment of the Court of Ordinary was affirmed.

To which decision counsel for McGehee excepted.

W. DOUGLASS, for plaintiff in error.

BULL and FERRELL, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question in this case is, whether letters of administration can be granted by the Court of Ordinary, to an applicant therefor, at any other term of the Court than the one to which *notice* has been given that the application will be made. From the record in this case, it appears that one Abraham B. Ragan, in July, 1848, applied to the Clerk of the Court of Ordinary, of Troup County, for letters of administration on the estate of John Omara, deceased. The Clerk issued the usual citation, and at the next term of the Court thereafter, Ragan being unable to give security, did not make application to the Court for letters of administration. The application, as made to the Clerk, remained and continued from term to term until the first Monday in March, 1849, when McGehee, by an agreement with Ragan, the former applicant, was appointed administrator, without any new citation or notice. The Act of 1799 declares, that "All applications for letters of administration shall be made to the Clerk of the Court of Ordinary, who shall give notice thereof in one of the public gazettes of this State, and by advertisement at the court house door of the County, at *least thirty days before the sitting of said Court of Ordinary.*" *Prince*, 231. According to the *strict letter* of the Act, it would seem that letters of administration could only be granted at the sitting of the Court immediately succeeding the publication of the thirty days' notice; but we believe that it has been the practice, under that Statute, when the cause has been continued by the Court, to grant letters at a subsequent term of the Court. We do not see any great objection to this practice, inasmuch as all the parties in interest are presumed to be present at the Court to which they were cited by the notice of the applicant, and when the application is *regularly continued by the Court*, for cause shown, at its discretion, the parties in interest are bound to take notice of such continuance. But where the applicant, as in this case, *fails*

to make his application to the Court for letters, to which he has cited the parties in interest to appear, and the same remains without being *regularly* continued by the Court, from term to term, by *the action of the Court*, the parties in interest have a right to consider the application as abandoned, and the Court below did not err in deciding that the letters of McGehee, appointed without any notice of his intended application therefor, as required by the Statute, should be revoked.

Let the judgment of the Court below be affirmed.

No. 30.—LEWIS PEACOCK, plaintiff in error, *vs.* STEPHEN TERRY, defendant.

- [1.] Where a bill charges a fraudulent sale and purchase under execution by defendant of complainant's property, proof of the admissions of complainant, that the sale was made in pursuance of an agreement between himself and defendant, is admissible.
- [2.] Where the pleadings are made up and the cause on trial, and the evidence closed and the argument progressing, it is not competent to amend the bill but for special cause; and not where there is special cause shown, if the effect of the amendment is to introduce a new cause of action.
- [3.] No one can maintain an action for a wrong done, where he has consented or contributed to the act which occasions the loss. Hence, if a complainant seeks to recover for an act of defendant, which he charges to be fraudulent, it is not a fraud against him if it was done in pursuance of an agreement between himself and the defendant.
- [4.] A complainant who participates with the defendant in an act by the defendant, which is in violation of the laws of the land, is not entitled to relief in a Court of Equity against the consequences of such act.
- [5.] A party who goes into Equity to seek relief against a usurious contract, who has paid principal and legal interest of the debt, must aver in his bill that he has paid the *principal* and *legal interest*, and that if anything remains of these unpaid, that he is ready and willing, and now offers to pay whatever balance of *principal* and *legal interest* remains unpaid.
- [6.] Facts alleged positively in a bill, are constructive admissions in favor of

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the defendant, and need not be proven. The complainant cannot deny them, even if they are not true, but must recover according to the case he makes upon the record.

In Equity, in DeKalb Superior Court. Tried before Judge HILL.

This was a bill in Equity, filed by the defendant in error against the plaintiff in error, returnable to DeKalb Superior Court, alleging that in the year 1831, complainant was in need of money, and applied to the defendant, who loaned him, at different times, sums amounting in the aggregate to \$502 46 cents, all at usurious interest; that complainant paid defendant, at different times, the aggregate sum of \$459 63 cents; that he renewed his note yearly up to 1837, when he gave defendant his note for \$807 65 cents, and to secure the same, gave the defendant a mortgage on lot of land No. 71, in the 14th district of originally Henry now DeKalb County.

The bill alleges, that in the year 1841, the said lot of land, together with another, known as lot No. 90, adjoining thereto, were levied upon by virtue of two executions against the complainant, when he entered into an agreement with the defendant, by which the defendant was to pay the plaintiffs in execution the amounts due them, and take them up and hold them against the complainant; that the defendant was to have the possession of both lots of land—on one of which there was a grist and saw-mill—with the exception of the dwelling-house, and fifty acres of land around it; that the use of the plantation and mills was to be a full compensation to the defendant for his interest on his mortgage debt and the executions; and that complainant was to have three years in which to redeem them, and upon failure of his redeeming them, the defendant was to take lands and mills at the price of \$1600.

The bill further charges, that a short time after the contract, the defendant stated, that as the lands had been levied upon, that he preferred their being sold, to prevent other creditors from interfering with him, to which complainant consented. The lands accordingly were sold, and the defendant became the

purchaser—representing, at the time, that his object in having the land sold was to perfect titles.

The bill further charges, that complainant and defendant worked together in repairing the mills, for some months, when the defendant denied the contract and turned the complainant out of possession.

The bill prayed that the defendant may account to complainant concerning the usurious transactions charged; also, that the note and mortgage may be delivered up to be cancelled, provided it shall appear that the principal has been paid; also, that the sale of the lands by the Sheriff be declared void, and the deeds be delivered up to be cancelled, or else that defendant be decreed to perform, specifically, his several agreements with complainant.

The defendant, by his answer, denied, either in whole or in part, most of the allegations charged in the bill.

On the trial of the cause, counsel, in order to rebut the presumption of fraud, offered to prove by one Thomas J. Perkinson, "that complainant had told him that said lands were sold and purchased by the defendant, in pursuance of an agreement made between complainant and defendant, prior to said sale, by virtue of which, the defendant was to bid off the lands at the sale, and was to have possession of the mills and all the lands, except the dwelling-house and fifty acres around it; that the use of the lands and mills was to pay the defendant for the interest upon the mortgage debt and the executions which defendant had purchased against the complainant, and that the complainant was to have the right to redeem said premises at any time within three years, and upon his failure to do so, the defendant was to keep the property at the price of \$1600." Which testimony was rejected by the Court, and counsel for defendant excepted.

Counsel for the defendant offered in evidence an affidavit made by the complainant before Thomas J. Perkinson, as a Justice of the Peace, in the year 1842, in which complainant had made similar statements to those sought to be proved by Perkinson. The Court rejected the affidavit, and counsel for the defendant excepted.

After the testimony had closed in the cause, and one counsel on either side had addressed the Jury, and the second counsel for the defendant was addressing them, he was interrupted by the Court, "who stated that he felt it to be his duty to state, that he did not think the complainant could recover with his bill in its then condition." Whereupon counsel for complainant moved the Court to amend the bill instanter, by striking out all that part of the same which contained anything in reference to the contract between the parties; and also by making material and substantial allegations in the bill in relation to the fraud charged to have been committed, at the sale of the lands by the Sheriff, by the defendant. Counsel for defendant objected to the motion. The Court overruled the objection, and allowed the amendments, and the defendant excepted.

Counsel for the defendant requested the Court to charge the Jury—

1st. That if they should believe, from the evidence, that the sale by the Sheriff was made in pursuance of an agreement made between the complainant and defendant, that it was not fraudulent as to complainant.

2d. That although they might believe that a fraud was practiced by defendant in said sale, yet, if they should believe that complainant was a participant in said fraud, that he had no right, in a Court of Equity, to be relieved against it.

3d. That complainants had no right to be relieved against the Sheriff's sale, by having the deed declared void, because he had made no offer in his bill to repay the defendant the money paid by him for said land, and had not tendered it or brought it into Court.

4th. That although they might be of opinion that the sale ought to be set aside, yet the complainant would have no right to recover damages for injuries done to the property, or for houses removed from the same, because he had set up no claim to such damages in his bill. All which the Court refused to charge, but in lieu of the third request did charge the Jury, "that if defendant had been guilty of a fraud, and had paid out his money for the land in pursuance of said fraudulent arrangement, that com-

plainant was under no obligation to pay him back his money, but that he might get it back the best way he could." The Court also charged the Jury, "that to entitle the complainant to relief against the payment of the usury, it was not incumbent on him to make a tender of the principal and lawful interest due on the money borrowed, or to bring the money into Court, provided it was a matter of calculation to ascertain whether the principal and interest had or had not been paid."

Counsel for defendant asked the Court to charge the Jury, "That the allegations and admissions in complainant's bill were evidence against him." To which the Court replied, "That this might be true in certain cases, but that in this case, the defendant had denied the allegations in the bill, and, therefore, they were not evidence for either party." The Court also charged the Jury, "that inasmuch as this bill had been amended by striking out all that part in relation to the contract between the parties, that they would have nothing to do with that part of the bill which had been stricken out, but would treat it as though it had never existed."

To all which charges and refusals to charge by the Court, counsel for defendant excepted, and upon these several exceptions has assigned error.

Judge WARNER, having been of counsel in the Court below, did not preside in this case.

CALHOUN & DABNEY, and EZZARD, for plaintiff in error.

MURPHEY and COLLIER, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The evidence of the witness, Perkinson, was offered on the trial before the amendments were made. The question of its admissibility is, therefore, to be determined with reference to the case at that time made by the bill. It was proposed by the defendant below, to prove by the witness, Perkinson, the statements of the complainant, that the lands were sold, and bought

by the defendant at Sheriff's sale, in pursuance of an agreement made between the complainant and defendant prior to the sale, and as to what that agreement was. One of the main grounds relied upon in the bill for a decree is, that the defendant having purchased executions against the complainant, which had been levied upon his lands, and whilst holding a mortgage upon the lands, had fraudulently caused it to be brought to sale, and by false statements and fraudulent pretences, that the sale was only for the purpose of perfecting titles in him, bought the same at a merely nominal price. One of the prayers of the bill is, that this sale be set aside. Now, this evidence was offered to prove that the land was brought to sale and bought by the defendant, in pursuance of and in accordance with an agreement between the parties that it should be so bought and sold. The plaintiff's ground for setting aside the sale, is the fraud in the sale. If there was no fraud, he (complainant) cannot set it aside. If the sale was by his consent and agreement, there can be no fraud against him. The evidence goes to show that consent and agreement, and to deny the fraud. It was pertinent to the issue—it was to prove the agreement by the *admissions* of the complainant, and ought to have been admitted. Upon the same grounds, and for the same reasons, the affidavit of the complainant, made before the Justice, (Perkinson,) to the same effect, ought to have been admitted.

The amendments to this bill, made on the trial, were erroneously made. Two things are to be considered—

1st. The time at which the amendments were made.

2d. The character and effect of the amendments.

[2.] This cause, as appears from the record, had been some six or seven years in Court. The pleadings were finally perfected and the issues joined, and the cause submitted to a Jury. The evidence was all submitted; one of the counsel for the complainant had addressed the Jury; also, one of the counsel for the defendant had addressed the Jury, and the second counsel for the defendant was in the act of addressing the Jury, when the Court interposed by saying, "That he felt it his duty to state, that he did not think the complainant could recover with

his bill in its then shape." Upon this, the counsel for complainant moved to withdraw the case from the Jury and continue it, with a view to amend, which motion the Court refused, but said he would allow the bill to be amended, *instantly*, if the defendant claimed no surprise; whereupon a motion was made to amend the bill, by striking out all that part of it which contained anything in reference to the contract between the parties, and by adding material averments in relation to the fraud charged to have been committed at the Sheriff's sale, without showing to the Court any reason why such amendments had not been before made. The defendant claiming no surprise, the motion was granted. I remark, here, that the fact that the defendant claimed no surprise, does not at all affect the question. He can be put upon claiming a surprise only in cases where the bill can be, according to law, amended. If, upon other grounds, these amendments were allowable, they were not in this case allowable, because they came too late. The rule as to amendments in Equity, when the pleadings are made up and the cause set down for a hearing, has been settled by this Court in several different cases. The bill, in such cases, is not amendable as matter of right. The motion to amend is addressed to the discretion of the Court, and that discretion will be exercised only upon some special cause shown. *Berry et al. vs. Mathews et al.* 7 Ga. Rep. 460. *Georgia R. R. & Bank. Co. vs. Milnor & Co.* 8 Ga. Rep. 316.

In this case the pleadings were made up—the cause had been in Court for years—the argument was in progress, and no cause for the amendment of any kind was shown. The parties pretended no cause. The Court seems to have allowed it, because, as the bill stood, the plaintiff could not recover. If that be a good cause, any case that is brought into Court may be amended, in an indefinite series, until the plaintiff is fortunate enough to make such a case as will, necessarily, force a recovery. The rights of the other party are to be protected. If such a rule of amendment, as that recognized by the Circuit Court in this case, obtains, I see no use for any of the rules of pleading whatever. The plaintiff has the game in his own hands, if there be no limit

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~~in~~ his right of amendment but his ability to recover on the case made in his bill.

But if special cause had been shown in this case, our judgment is, that the amendments would, in that event, have been improperly allowed. A good cause of action, defectively charged and set forth in the bill, may, under the circumstances of this case, upon special cause shown, be helped by amendment; but the effect of these amendments, in our opinion, is to change, essentially, the cause of the plaintiff's action—it is, in effect, the substitution of a different cause of action for that contained in the bill. It gives altogether a different cast to the bill. The bill sets out a loan of money to the plaintiff by defendant, at usurious interest, and a mortgage executed upon plaintiff's lands to secure it. It charges, that plaintiff's land being levied on by other judgment creditors, he proposed to defendant that he should take up these judgments, and he would give up into his possession his lands, with a small reservation, and that the use of the same should go to the payment of the interest on the mortgage debt, and that plaintiff should have the privilege of redeeming his lands within or at the end of three years, and if he should fail to redeem them, the defendant to have the lands in fee at and for \$1600. To which the defendant assented, and the arrangement was accordingly carried into effect. Defendant took up the judgments, and went into possession of the lands. It farther charges, that the levies on his lands had not been dismissed, and a short time before the sale, the defendant proposed to him to permit the lands to go to sale under the incumbrance of his mortgage, and that he (defendant) buy them in, giving as a reason for this course, that they would not then be troubled with any other contracts of the complainant in future. To this proposition, the bill states, the complainant at first objected, but did finally yield his assent. A part of this latter understanding was, that defendant would still comply with the previous agreement as to the lands. The bill proceeds to charge, that it was agreed that the plaintiff and defendant should attend the sale; that defendant should call for plaintiff; that he did not do so, but went to the court-house another way, and before the plaintiff

got to Decatur, at an early period in the sale hours, caused the lands to be sold, and became himself the purchaser, for \$37, and took the Sheriff's title therefor. The bill charges the lands, so bought, to have been worth \$4500, or other large sum, and that they were sacrificed in consequence of the representations made by the defendant; that the agreement between himself and the complainant made the sale merely formal. The prayer is, that the defendant account with the plaintiff touching the usury; that the notes and mortgage be delivered up to be cancelled, if it should appear that the original principal is paid, &c.; that the sale by the Sheriff be declared void and the Sheriff's deeds be cancelled, and a general prayer. Such is the bill. The motion was to amend, "by striking out all that part of the bill which contained anything in relation to the contract between the parties, and to make material and substantial allegations in relation to the fraud charged against the defendant at the Sheriff's sale," which was done. Now, the bill set forth two contracts between these parties—First, in relation to the delivery of possession of the lands, with the plaintiff's right to redeem, in consideration that defendant would take up the judgments, &c. and it admits that this contract was executed. It also sets out an agreement, secondly, that defendant should buy the lands, just as he did buy them, at Sheriff's sale. The amendment sweeps from the bill both these contracts or agreements, and retains all the allegations as to the usury, and all the allegations as to the fact of the sale, and the fraud, touching that sale. Nay, more: the plaintiff was not only allowed to take back all his averments and admissions touching these agreements, retaining just those which charged a fraudulent sale, and no more, but also to strengthen his charge of fraud by new allegations.

According to the bill as it stood, there could be no fraud in the sale, as against the plaintiff, because it was by agreement and consent of the plaintiff. According to the bill as amended, the agreement abstracted, it was a naked fraud. This statement is enough to show, without argument, that the amendments change the whole character of the bill, and vitally affect the rights of the defendant on the trial. If amendments like these

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are admissible, after the defendant has answered, replication filed, and the evidence not only prepared, but adduced, -I repeat, I do not see how a defendant in Equity is benefited by any of the rules of pleading.

[3.] The counsel for the defendant requested the Court to instruct the Jury, "That if they believed, from the evidence, that the sale by the Sheriff was made in pursuance of an agreement made between the complainant and defendant, that it was not fraudulent as to the complainant," which he declined to do. This, we think, was error. The bill, as we have seen, charges a fraud in the sale, and that fraud is the ground of the demand that the sale be decreed to be null and void, and the Sheriff's deeds be delivered up to be cancelled. It was clearly competent for the defendant to disprove the allegations of fraud in the sale. This he might do by proving that the sale was in pursuance of, and according to an agreement between himself and the complainant. If such an agreement was proven, and the sale proven to have been according to it, it is very plain that the sale itself was no fraud upon the complainant; and so far as the complainant's right of recovery depended upon that fraud, it would be effectually denied by the proof. It is a well understood maxim of the Common Law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions the loss, *volenti non fit injuria*. It was just this rule (for it is a rule) of the law, that the defendant requested might be given in charge to the Jury. *Plowd.* 501. 4 *Bing.* 628, 639, 640. *Browne's Legal Maxims*, 128, *marg. p.*

[4.] The defendant requested the Court to instruct the Jury, "That although they might believe that a fraud was practiced by the defendant in said sale, yet if they should believe that the complainant was a participant in said fraud, that he had no right, in a Court of Equity, to be relieved against said fraud." The Court refused so to instruct them, and this, also, we think was wrong. The idea of a man's participating in a fraud against himself, is absurd. Indeed, a willing assent to the act which is claimed to be a fraud, would divest it of that character, and, as we have seen, would deny to the party any right of action

thereon; The fraud contemplated in this desired instruction, is a fraud upon third persons. The agreement stated in the bill touching the sale of the lands, was, as the defendant expressed it, for the purpose of preventing any trouble in future from other contracts of the complainant. In consequence of this object, thus stated for the agreement, it was claimed to be void, as against the rights of creditors, and in contravention of the laws of the land. Whether it was or not, depended upon all the facts before the Jury, and the law applicable to them; and how far this question might affect the complainant's right of recovery, taking the whole case together, we are not called upon to decide. The question for us is this—admitting that the Jury should believe that the sale under the agreement was a fraud, perpetrated by the defendant upon third persons, and that complainant was a participant in that fraud—is he entitled, in Equity, to relief from the consequences of the fraud to him? We are very clear that he is not. Complainants in Equity must come in, if at all, with clean hands. Equity will not permit him to allege his own moral turpitude, or his own violation of the law, as a ground of redress. If he is *in pari delicto*, the condition of the defendant is the best.

If a contract is in violation of a public law, or of the policy of the law, and is executed, Equity will leave the parties as they are. It will not interfere to set the parties back where they were at the beginning. If one has got the advantage, he will be allowed to retain it; and if the other applies to Chancery for relief, he will be turned away. That is this case. If this agreement was a fraud upon the rights of third persons, it being violative of a public law, and being consummated by the sale, the complainant being a party to it, and thereby a participant in the fraud, is not entitled to relief in Equity. If, however, the contract or agreement remains unexecuted, and one party goes into Equity to enforce it, the *defendant* may defend against it upon the ground of its being against the law, not because the law regards his rights, but because of public policy. This he may do, both at Law and in Equity. Such, I believe, is the whole doctrine upon this subject. See it discussed by this Court at large, in

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Adams vs. Barrett, 5 Geo. Rep. 406, and in *Howell, adm'r, vs. Fountain and others*, 3 Kelly, 176.

The defendant requested the Court to instruct the Jury, "That although they might believe that the sale ought to be set aside, yet the complainant had no right to recover damages for injuries done to property, or for houses removed from the same, because he had set up no claim in his bill to such damages," which was refused. This refusal, we believe, also, to be error, and so adjudge it; and for the single reason stated in the request, to wit: because the complainant does not, in his bill, set up any claim to damages on account of injuries done to the property, or on account of the removal of houses from the premises.

Every material fact to which plaintiff expects to offer evidence ought to be stated. The complainant cannot, in his proof, go out of the allegations in his bill, and of course he is entitled to no decree for that which is not established by proof. We have looked carefully through the bill, and find no allegations under which he can prove damages done to the property, or damages for removing houses. No such injuries or removals are charged upon the defendant. The prayers, however general or numerous, cannot authorize a decree outside of the case which the bill makes. 1 Bro. Ch. R. 94. 6 Johns. R. 595. 3 Swanst. 472. 3 P. Wms. 276. 2 Atk. 96. 11 Vesey, 240. Story's Eq. Plead. §28.

[5.] It is claimed that the Court erred in instructing the Jury, "That to entitle the complainant to relief against the payment of usury, it was not incumbent on him to make a tender of principal and lawful interest, due on the money borrowed, or to bring the money into Court, provided it was a matter of calculation to ascertain whether the principal and interest had or not been paid." We are not satisfied with the allegations in this bill, relative to the payment, or offer to pay of the principal and lawful interest. A party to a usurious contract is not entitled to relief, in Equity, against the usurious interest, unless he pays, or offers to pay the principal and lawful interest. This is the rule. In cases where he has paid the whole of the principal and lawful interest, and distinctly avers that fact, and that he is ready and

willing to pay the balance, if any is due, he must be entitled to relief. But the complainant in this bill, does not make clearly and distinctly these averments. He does not, with sufficient distinctness, offer to pay, or avow his readiness and willingness to pay whatever of principal and lawful interest remains unpaid, if any is found unpaid. In the amendment to the bill made in 1846, he says, "Your orator farther states, that he has paid to said Lewis Peacock all that is reasonably and legally due on the aforesaid note and mortgage, and that the same ought to be delivered to be cancelled, and further states, that if said debt is not fully paid, that your orator is ready and willing, and herewith offers to pay to said Lewis Peacock whatever balance is really and legally due him." The averment is, first, that he has paid all that is *reasonably and legally due* on the note and mortgage. There is no such rule in Equity, as that a party shall pay what is *reasonably due*, before he is entitled to relief. Who is to judge of what is *reasonably due*? The complainant himself in the first instance. Upon that averment, it is clear that he is not entitled to relief. He farther says, that he has paid all that is reasonably and *legally due*. *Legally* leaves the matter still indefinite. What is due in the contract, *at Law*, is the principal only. There is a fixed rule on this subject in Equity, which is, that he must pay the *principal and lawful* interest, or tender it, and aver his willingness to pay it. He must come up to this rule. The other averment is obnoxious to the same exception. He says, if he has not fully paid the debt, he is ready and willing, and offers to pay whatever balance is *really and legally due*. Before, in our judgment, he is entitled to relief in this case, he must aver that he has paid the *principal and lawful* interest due on the note, and if *principal and lawful* interest are not paid, he is ready and willing, and offers to pay whatever balance of *principal and lawful* interest remains unpaid. Any requirement short of this would enable parties to evade the general rule. 1 *Fonb. Eq. b. 1, ch. 1, §3, note h.* 4 *Bro. Ch. R. 436.* 1 *Johns. Ch. R. 367.* 5 *Ib.* 142, '3, '4. *Story's Eq. Jurisp. §301.*

[6.] The Court was farther requested to instruct the Jury, "That the allegations and admissions in complainant's bill are

evidence against him," which he declined to do, but instead, instructed them, "That in this case the defendant had denied the allegations in the bill, and, therefore, they were no evidence for either party." The rule as to the force and effect of the allegations made by the complainant is this: facts alleged, positively, are constructive admissions in favor of the defendant, of the facts so alleged, and, therefore, need not be proven by other evidence. The plaintiff by introducing them in his bill, and making them a part of the record, precludes himself from disputing their truth, whether they be true or false. The allegations and admissions of the complainant's bill are, therefore, evidence against him. The Court does not controvert this general rule, but holds that, in this case, they are not evidence for either party, because denied by the defendant. However, it may be true that such a denial, by the defendant, would seem to neutralize the effect of the allegations and admissions, still it is true that the complainant is bound by them—he cannot dispute their truth—nor can he prove and recover but according to them—they being taken as true. He cannot prove and recover according to a case inconsistent with the case he has made upon the record, and in this light they are to be regarded by the Jury. 2 *Daniel's Ch. Prac.* 974. *Gresley's Eq. Evid. Am. edit.* 8, 9.

The Court instructed the Jury, that those parts of the bill stricken out by the amendment, were not to be regarded by them. That was proper as the case stood after the amendments. Believing, as we do, that the amendments were improperly made, the bill is to be regarded as though no amendments had been made.

Let the judgment be reversed.

CASES

ARGUED AND DETERMINED,

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,
AT GAINESVILLE,

OCTOBER TERM, 1850.

Present—JOSEPH H. LUMPKIN, }
HIRAM WARNER, } Judges.
EUGENIUS A. NISBET, }

No. 31.—FRANCES GALT, *et al.* plaintiffs in error, *vs.* ABEL JACKSON, defendant.

- [1.] A sale of property by J to G, and an obligation by G to re-convey the same property on certain conditions, where the transaction does not create the relation of debtor and creditor between the parties, is not a mortgage, and G will only be held to a compliance with the terms of his bond.
- [2.] A conveyance of property to prevent the lien of expected judgments from attaching is illegal, and the party so transferring his property will not be aided by a Court of Equity in reclaiming it.*
- [3.] Two witnesses, or one with probable circumstances, will be required to outweigh an answer asserting a fact responsively to the bill; more especially if there be three defendants all concurring in the same statement.
- [4.] When the Court is requested by counsel to charge on points of law which bear upon the case, it is the duty of the Court to charge on the points.

In Equity, in Murray Superior Court. Tried before Judge WRIGHT, March Term, 1850.

*See case immediately preceding this.—[B. & F.]

Galt and others vs. Jackson.

In 1845, Abel Jackson sold a negro, named Caroline, to Frances Galt for the sum of \$400, and she gave to James McGehee an obligation to the effect, that if McGehee should, within one year, tender to her the same amount of \$400 and the bond, that she would convey the negro, if alive, to the said McGehee, for the use and benefit of the family of the said Jackson. McGehee did not tender the money, nor claim the fulfilment of the bond, but Jackson tendered the amount, and demanded that the negro be conveyed to a third person, to whom he wished to sell her, which Mrs. Galt refused to do. Whereupon this bill was filed to compel her to convey the negro as required, if alive, and if not, to account for her value.

It appeared in evidence, that at the time Jackson sold the negro, he was in debt, and that judgments were about to be obtained against him. On the trial of the cause, defendants requested the Court to charge the Jury, that if the money paid by Frances Galt to Abel Jackson was not a loan, and did not create the relation of debtor and creditor, then the sale and bond to re-convey did not assume the character of a mortgage, but was a conditional sale, and that Mrs. Galt was only bound to comply with the express terms of her bond, and on the performance of all the conditions by the other party; and farther, that if the sale by Jackson was to defeat creditors, that Equity would not entitle him to a re-conveyance.

Which charges the Court refused to give, only saying to defendants' counsel, that if he charged at all, it would be against them.

The Jury found for complainant; whereupon defendants excepted to the refusal of the Court to charge as requested.

BROWN, for plaintiffs in error.

No one representing defendant, the cause proceeded *ex parte*.

By the Court.—LUMPKIN, J. delivering the opinion.

Abel Jackson filed his bill in the Superior Court of Murray County, charging, among other things, that on the 3d day of

March, 1845, he was the owner of a negro girl, named Caroline; that being in want of \$400, he mortgaged said slave to Edward M. Galt, as the agent of Frances Galt, and delivered the possession of the girl to Edward M. Galt, upon the receipt of the money; that said Galt, as agent of his mother, Frances Galt, executed a bond to re-convey said negro, provided James McGehee should, with the said bond, tender to the said Frances Galt \$400 in cash, twelve months from the date of the covenant. In that event, the said Frances Galt was to make titles to the said James McGehee, to the girl Caroline, provided McGehee should want her for the use and special benefit of the family of Jackson, the complainant, and provided, also, the girl should then be alive. The bill farther charges, that McGehee had no personal interest in the transaction, and was not expected to advance the purchase money, but that the whole responsibility of redeeming the property devolved upon the complainant, Jackson; that the money was tendered, together with the bond, as stipulated, and a re-conveyance demanded, and that the same was refused, and that the girl was worth \$550. The bill farther charges, that application was repeatedly made to James McGehee, to secure to the complainant and his family, the benefit of said agreement, which he has fraudulently refused to do, and that the negro has been retained in contravention of the express condition in said bond. The prayer of the bill is, that the negro may be redeemed upon the payment or tender of the purchase money, if in life, and if dead, that the parties may be decreed to pay the difference between the price paid and the true value, or the surplus of value, generally, to the complainant.

To this bill the defendants severally answered. Frances Galt states, that being in want of a girl, she authorized her son, Edward M. Galt, to buy one for her; that in accordance with said instructions, he purchased the girl Caroline, at the sum of \$400, which was considered, at the time, her full worth; that she took an absolute bill of sale to the girl, and for the better securing the title, required James McGehee, the father-in-law of the vendor, to join in the warranty; that she never considered Jackson her debtor, nor was there any other understanding con-

nected with the transaction, except the bond, which her son executed in her name, for the re-purchase of the girl, the condition of which is set forth in substance in complainant's bill. She positively denies that James McGehee, or the complainant, or any one else did, at the time specified in the bond, or at any other time, tender to her the sum of \$400, together with said bond. She considered \$400 the full value of the girl. Negroes were low at that time, and she purchased a likelier girl, a short time previously, for that sum.

Edward M. Galt admits by his answer, that as the agent of his mother, he bought Caroline of Abel Jackson, for \$400, and paid him the money, and took possession of the girl, but positively denies that the money was advanced as a loan, but paid as the price of the property. He admits that, as the agent of his mother, he executed the bond mentioned in the bill, for the re-sale of the girl, upon the terms stated. He states, that the main inducement for entering into this arrangement was, to defeat the lien of certain suits which were about maturing to judgment against Jackson, as security for some one, whose name is not given, and that it was well understood between the parties, that the re-conveyance was to be made to no one except James McGehee, as that would defeat the only object of the bond, namely: the provision intended to be made for the use and benefit of Jackson's family. He admits that the bond was tendered to him, at or about the time stipulated, but James McGehee regretted his inability to raise the money, and seemed much concerned lest the object of the bond should fail for want of the funds. He admits, also, that Jackson called, in company with a negro-trader, and expressed himself ready to pay the \$400, provided a title could be made directly to this speculator. Jackson did not pretend to have the bond. He admits that he refused to receive the money, or to re-convey the title to any one else than James McGehee, and for the purposes designated in the bond. He denies that any other tender was ever made by Jackson. He admits that Caroline, at the date of the sale, might, perhaps, have been worth a fraction over \$400, though negroes were very low at that

time, and girls of the same description were sold for that sum or less.

James McGehee confirms the answer of Edward M. Galt, in every important point, and states farther, that he applied to Abel Jackson to raise and furnish him with the money necessary to enable him to secure the title to the negro to his family, which he failed to procure. He tendered the bond, without the money, but Edward M. Galt refused to re-convey on that account, but expressed himself entirely ready and willing to comply with the terms of the bond, provided the \$400 were refunded. He thinks \$400, cash, was as much as the negro was worth at the time of the sale. He denies that Abel Jackson ever applied to him to maintain his (complainant's) rights in the premises. He admits that he did ask him for a certificate, to the effect that Caroline was as much his property *after* as *before* the transfer, which he refused to give, inasmuch as he should, by doing so, have attested a falsehood, wilfully and thoroughly.

The cause was submitted to the Jury upon the bill and answers and exhibits, to wit: the bond and bill of sale; admissions made by the parties at the hearing, and the testimony of Alfred M. Turner, who swore that he considered Caroline worth \$550, in March, 1846, twelve months after the date of the bond.

The evidence being closed on both sides, counsel for the defendant requested the Court, in writing, to charge the Jury as follows:

1st. That if the money was not advanced by way of a loan, and the relation of debtor and creditor did not exist between complainant and Frances Galt, it was not a mortgage.

2d. That if the complainant had the privilege of refunding or not, if he pleased, in twelve months, and thereby entitle himself to a re-conveyance, it was a conditional sale.

3d. That if it was a conditional sale, Equity will not relieve the complainant, unless he performed the conditions on which the privilege of refunding depended.

4th. That this could only be done by tendering the money and bond, and consenting to take a conveyance of the negro to *James McGehee, for the use and benefit of complainant's family,*

as stipulated in said bond, and that a tender of the money, with a refusal to take such conveyance as was agreed on in said bond, did not entitle the complainant to a conveyance of a different character.

5th. That if, from the evidence, the Jury believed that the object of the complainant was to defeat the lien of the judgments with which he was threatened, the contract was illegal, and that complainant, coming into Court with unclean hands, was not entitled to recover.

6th. That the answers of the defendants in relation to the value of the negro, are evidence, and that that evidence is conclusive, unless it is rebutted and destroyed by the testimony of two witnesses, or one witness, and other evidence equivalent to the testimony of another witness.

The Court refused to give the instructions as asked, but, on the contrary, replied, "Were I to charge at all, it would be against you."

To the decision of the Court, refusing to give the instructions asked, and intimating a contrary opinion of the law, counsel for the defendants excepted, and now prosecute this writ of error.

[1.] The first question to be settled is, was this contract a mortgage or a conditional sale? Chancellor *Kent* lays down this as the test of the distinction: If the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage; but if the debt be extinguished by the agreement of the parties, or the money advanced was not by way of loan, and the grantor has the privilege of refunding, if he pleases, by a given time, and thereby entitling himself to a re-conveyance, it is a conditional sale. 4 *Kent's Com.* 5 ed. p. 145, note. And he cites *Slee vs. Marshallton Company*, 1 *Paige's Ch. Rep.* 56. *Goodman vs. Grierson*, 2 *Ball. & Bat.* 274. *Marshall, Ch. J. in Conroy vs. Alexander*, 7 *Cranch*, 237. *Roberson vs. Cropsey*, 2 *Edwards' Ch. R.* 138. *Flagg vs. Mann*, 14 *Pick.* 467. 2 *Sumnor*, 534. *Holmes vs. Grant*, 8 *Paige's Rep.* 243.

Now, applying this test, either to the transaction as evidenced by the bond and bill of sale, or as confirmed by the uncontradicted corroborating testimony, is it not clear that it was a conditional

sale, and not a mortgage? The relation of debtor and creditor never did exist between Abel Jackson and Mrs. Frances Galt; nor did any debt subsist between these parties after the consummation of the contract. Suppose the girl, Caroline, had died within the twelve months from the date of the transfer, would it be pretended that Mrs. Galt would have had the right to go upon Jackson for the payment of the \$400? And if she could not, this fact fixes, conclusively, the character of the agreement. It is equally plain, that Jackson could not have been compelled to redeem the property by any proceeding against him, either at Law or in Chancery, *in rem* or *in personam*. *Flayor vs. Lavington*, 1 P. Will. R. 270, '71. *King vs. King*, 3 P. Will. R. 360. *Longuet vs. Seanon*. 1 Ves. R. 406. *Mellor vs. Lees*, 2 Atk. Reports, 496.

This, then, being a conditional sale, and Jackson having neglected to perform the condition on which the privilege of repurchasing depended, a Court of Equity will not relieve him. It is true, that within the twelve months, James McGehee tendered the bond, and expressed his anxiety to have the title to the property secured to Jackson's family, but no money was paid, or offered to be paid. It is true, also, that Jackson announced that he was ready to advance the \$400; but he insisted that the transfer should be absolutely and unconditionally made to a negro-trader, who accompanied him with the money for that purpose. To both of which applications, the simple and only necessary reply of Mrs. Frances Galt, or Edward M. Galt, her agent, was "*non hæc in fœdera veni*," not unto any such stipulation as these have I come. The Master of the Rolls, in *Davis vs. Thomas*, (1 Russ. & Mylne's R. 506,) says, "Where there is a privilege conferred, as provided the money be paid within a stated time, there, the party claiming that privilege must show that the money was paid accordingly; as in case of interest reserved on a loan, at five per cent. with a proviso, that four per cent. will be accepted, if paid within a limited time after it becomes due; or in the case of a covenant for the renewal of a lease on the payment of a certain fine at a stated period. Here it is admitted, that the rent was not duly paid at the stipulated

times, and no fraud, surprise or accident is alleged, the plaintiff is not entitled, therefore, to the re-purchase which he claims by his bill."

[2.] In the next place, if the object of this agreement was to defeat the judgments with which Jackson was menaced, Equity will not interpose for his relief. The general rule upon this subject is well established, and it is this—that where parties are concerned in illegal agreements, they are left without remedy against each other, provided they are both *in pari delicto*. Courts acting upon the familiar maxim, *in pari delicto portior est conditio defendentis et possidentis*. *Brumley vs. Smith*, Dug. Rep. 697, note. *Ib.* 698. *Vandyck vs. Herritt*, 1 East. R. 96. *Hanson vs. Hancock*, 8 T. R. 575. *Browning vs. Morris*, Cow. Rep. 790. *Osborne vs. Williams*, 18 Ves. 379. *Buller*, N. P. 131, '32. 1 Fonbl. Eq. b. 1, ch. 4, §4, note y. The object of the law is to enforce the obligations of virtue, by withholding every encouragement from wrong. There are cases, however, where transactions are repudiated on account of their being against public policy—as usurious and gaming contracts—and relief will be granted in Equity, notwithstanding it is asked by one who is *particeps criminis*. The reason is, that the public interest requires that relief should be given, and it is given to the public through the party. 1 Story's Eq. §298. But this is the exception to the principle already stated, and the present case does not fall within it.

[3.] As to the charge which was asked, as to the effect of the answers, we are not prepared to say that the language was too strong under the circumstances of this case; for not only one defendant, but all three concurred in swearing that the price paid for the negro was a full equivalent at the time of the sale, and *Turner* was the only witness who gave any contradictory testimony. Two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill. The reason upon which the rule stands is this—the plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other wit-

ness, and as the plaintiff cannot prevail, if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance; and there may be evidence, arising from circumstances, stronger than the testimony of any single witness, so that we are not prepared to say, that there has been any relaxation, of late years, in the doctrine of the Civil Law, as is usually stated to be the case, *responsio unius non omnino audiat*, (Code 4, 209,) requiring the evidence of two witnesses to rebut the answer, or in the language of the instructions as prayed, the evidence of one witness, and other evidence equivalent to the testimony of another witness; and if this be the rule, where there is only one defendant, how much stronger is it where there are three, who all agree touching the matter upon which the decree is to be founded, and which is directly put in issue by the bill?

[4.] A single remark as to the refusal of the Court to charge *at all*, when asked to do so, and its reply to the request, that if it charged in the case, it would be against the defendants. We apprehend that it is the duty of all Courts, when the evidence is gone through, in the presence of the parties—the counsel and all others—to sum up the facts to the Jury, and to give them his opinion in matters of law, arising upon the evidence, (3 *Black. Com.* 375,) more especially when the Court is asked to do so. Should the Court differ from counsel, the clear presentation of the law, from the Bench, might satisfy counsel that they were in error, and the result would be an acquiescence in the opinion, as delivered. But be that as it may, the duty is imperative, and justice to counsel, clients, the Jury and the country, requires its performance.

For all these reasons, the judgment must be reversed.

Morris vs. McCamey.

No. 32.—JAMES MORRIS, plaintiff in error, vs. WILLIAM McCAMEY, defendant.

- [1.] A plaintiff seeking to recover for injury done his land by the erection of a mill-dam, cannot recover, where paramount title is shown in another, by his own evidence.
- [2.] A plaintiff in *fi. fa.* requiring the Sheriff to levy on the interest of the defendant in a lot of land, is not thereby prevented, in another suit, from contesting the title of the defendant in the *fi. fa.* to the land so pointed out.
- [3.] An allegation, that defendant caused, by the erection of a mill-dam, "*an unhealthy pond of standing water*," is not sufficient to authorize the introduction of testimony showing injury sustained by plaintiff, in consequence of sickness caused by the pond.

Case, in ~~Murray~~ Superior Court. Tried before Judge WRIGHT, March Term, 1850.

William McCamey brought his action against James Morris, alleging that Morris, by the erection of a mill-dam in Connesauga river, by which "an unhealthy pond of standing water" had been raised, and certain land of plaintiff had been covered and injured. Plaintiff showed, by his own testimony, that the legal title to a part of the land injured was in William McCamey, Sr. Plaintiff claimed under a Sheriff's deed, selling the land as the property of one Timothy McCamey, under a *fi. fa.* in favor of Morris, the defendant in this action.

It was proven, that at the time of the Sheriff's sale, Timothy McCamey was in possession of the land, and Morris had directed the Sheriff to levy on the interest of said T. McCamey in it. On the trial, defendant objected to the introduction of the Sheriff's deed, because plaintiff had already shown paramount title in William McCamey, Sr.

The Court overruled the objection, on the ground that Morris was estopped from denying the title of Timothy McCamey, by having caused the land to be sold as his.

Testimony was introduced going to show injury to plaintiff by sickness caused by the dam, to which defendant objected, on the

ground that there was no sufficient allegation to that effect in the declaration.

This objection was also overruled by the Court. To which decisions defendant excepts.

PEEPLER and HULL, representing UNDERWOOD, for plaintiff in error.

BROWN, for defendant.

By the Court.—WARNER, J. delivering the opinion.

The plaintiff in the Court below brought his action against the defendant, to recover damages for ~~obstructing his~~ ^{obstructing} his land with water by the erection of a mill-dam, and ~~also~~ ^{also} for injury done to his health caused thereby. The plaintiff alleged title to the premises, consisting of two lots of land, Nos. 249 and 256, in the 9th district of Murray County.

[1.] On the trial, the plaintiff introduced in evidence two grants from the State of Georgia to the drawers of the lots of land in question, and deeds of conveyance of the same from the drawers (Connelly and Garr,) to Wm. McCamey, deceased. The plaintiff also introduced in evidence a *fi. fa.* in favor of Jas. Morris against Timothy McCamey, which had been levied upon the defendant's interest in the two lots of land, pointed out by Morris, which were sold, and purchased by Robert McCamey at Sheriff's sale, and a deed from the Sheriff to Robert McCamey, also a deed from Robert McCamey to the plaintiff. It was also shown that Timothy McCamey was in possession of the land by his tenant, at the time of the levy thereon by the Sheriff. It was objected on the trial, that the plaintiff was not entitled to recover, because his own evidence showed *paramount* title to the land in William McCamey, deceased, or his heirs, and that the plaintiff could not recover on the title derived from Robert McCamey, who purchased the premises at Sheriff's sale, as the property of Timothy McCamey, for the reason that the plaintiff had shown, by his own evidence, that the *paramount* title to the land was in

Morris vs. McCamey.

the aforesaid William McCamey, deceased, or his heirs, and no title thereto had ever passed to Timothy McCamey, the defendant in execution.

In whom did the plaintiff's evidence show the *paramount* title to the land to be, at the trial?

The plaintiff's evidence showed that the lots of land had been granted by the State to Connelly and Garr, the drawers thereof, and by them had been respectively conveyed by deed to Wm. McCamey, Sr. who was said, on the argument, to be dead, although the record does not show that fact.

There was no conveyance of the land shown to have been made from William McCamey, Sr. to the present plaintiff in the action. William McCamey, the present plaintiff, derives his title through Robert McCamey, who purchased the land, as the property of Timothy McCamey, at Sheriff's sale. There is no evidence of any deed of conveyance of the land from William McCamey, Sr. to Timothy McCamey, the defendant in execution; there was some evidence, however, that he had a bond for titles, but no evidence as to the payment of the purchase money. The evidence, as disclosed by the record, showed most clearly, in our judgment, the paramount title to the land to have been in William McCamey, Sr. and not in William McCamey, the plaintiff in the action.

Had the plaintiff only showed the *possession* of the defendant in execution, and the sale of the land under it by the Sheriff to Robert McCamey, and the deed of Robert McCamey to the plaintiff, he would have made out a *prima facie* case, which would have entitled him to maintain his action. Then, it would have been incumbent on the defendant to have shown that the paramount title to the land was in another party; but the plaintiff, it seems, saved the defendant the trouble, by showing that fact himself.

[2.] It was urged on the argument, that inasmuch as Morris, the present defendant, was the plaintiff in the *fi. fa.* which sold the land, and pointed it out as Timothy McCamey's property for the Sheriff to levy on, that he is now *estopped* from insisting that the paramount title is in another.

It appears that only the *interest* of the defendant in execution to the land was pointed out and sold by the Sheriff; besides, the plaintiff himself showed the paramount title to have been in Wm. McCamey, Sr. and thereby, showed title out of the plaintiff, who derived his title through Robert McCamey, the purchaser at the Sheriff's sale of the *interest* of Timothy McCamey in the land.

If Timothy McCamey had no interest in the land, at the time of the levy, or an *inferior* interest to the true owner, the pointing out the land to be levied on did not enlarge that interest. . . . Whatever interest the defendant had in the land was sold, and nothing more. When the plaintiff, by his own evidence, showed that the *paramount* title to the land was in another, the defendant was not estopped from insisting on that fact in his defence.

[3.] On the trial, testimony was ~~offered and~~ received, going to show that the plaintiff had sustained injury to his health, in consequence of sickness caused by the mill-pond.

This evidence was objected to upon the ground, there was no *allegation* in the declaration which would authorize its admission.

The allegation is, that by the erection of the mill-dam, "an unhealthy pond of standing water has been raised." This allegation, in our judgment, is not sufficient to have admitted the evidence, under the Judiciary Act of 1799.

Whether that "unhealthy pond of standing water" made the plaintiff or his family, or any one else sick, is not alleged. .

Let the judgment of the Court below be reversed.

No. 33.—KINCEN HARRISON *et al.* plaintiffs in error, *vs.* ENOS McHENRY, defendant in error.

- [1.] A Sheriff cannot purchase at his own sale, neither for himself nor as agent for another, but such purchase is void.
- [2.] Though a subsequent ratification by the principal will confirm an assumed agency, not so if the agency be in itself illegal.
- [3.] The lien of a judgment no longer attaches to property sold by the Sheriff under a younger judgment. The remedy of the creditor is to claim the fund.

Ejectment, in Union Superior Court. Tried, September Term, 1850, before Judge HOOPER.

Enos McHenry had caused a *fi. fa.* in his own favor, against Kinchen Harrison and others, to be levied on a lot of land, and constituted Henry Harrison his agent to bid for it at the sale. Harrison did not bid, but requested Roach, the Sheriff who sold the land, to bid for it. Roach bid it off, and afterward conveyed it to McHenry, under which deed plaintiff claimed to recover.

The land was subsequently levied on and sold by virtue of sundry Justices' Court *fi. fas.* against said Harrison and others, of older date than McHenry's *fi. fa.* and was bid off by one of the defendants, under which last sale and the Sheriff's deed thereon, defendants claimed.

Defendants insisted that the first sale was void, because the Sheriff had bought at his own sale, and further, that Roach could not be considered as the agent of McHenry, because Harrison could not delegate his authority as agent, nor was it a case where an assumed agency could be subsequently confirmed.

Defendants also insisted, that the last sale was valid as against the first, being founded on an older *fi. fa.*

The Court ruled, that McHenry's title was good, and he recovered the premises, and defendants excepted to said ruling of the Court.

MARTIN and PEEPLES, for plaintiff in error.

W. H. UNDERWOOD, represented by HULL, for defendant.

By the Court.—NISBET, J. delivering the opinion.

The presiding Judge instructed the Jury, that if they believed that the Sheriff was the agent of the plaintiff, McHenry, at the time of the sale, and bid off the property for him as such agent, they would be authorized to find for the plaintiff.

[1.] The exception to this instruction makes the question, whether the Sheriff, at a sale under execution, conducted by himself, can act as the agent of an absent person in the purchase of the property. It was assumed in the argument, and the assumption seems to me to be indispensable to the power claimed for the Sheriff in the instruction, that it is competent for him to make a valid purchase at his own sale. If he can buy on his own account, it would seem that he can also purchase as agent for another; and if he cannot buy on his account, he cannot purchase as agent for another. At least, some of the reasons which forbid his buying on his own account, equally forbid his acting as agent. Trustees, generally, are unable to buy the property of their *cestui que trust*. The purchase is not in their case void, *per se*, but the *cestui que trust* may come in, as a matter of right, and set it aside. He may do this, whether the sale be *bona fide* or not. His right to set it aside does not depend upon the fairness of the transaction. The honesty of the trustee has nothing to do with it. The object of the rule is to secure fidelity in the trustee to the interests committed to his hands. To secure this, the law does not abrogate his purchase, because it was fraudulent and injurious to the rights and interests of the *cestui que trust*, but goes upon the idea, that he shall not be subjected to the temptation of violating his trust by committing a fraud. It shields him from the temptation, by declaring him incapable of making a purchase which will bind those whom he represents; and it gives them the option of vacating or affirming the purchase, according as they may consider it their interest to do the one or the other. This election the *cestui que trust* must make in a reasona-

ble time. He may affirm it, and then it becomes unimpeachable. A distinction was at one time sought to be made between a private sale and a sale at auction. The rule, however, is now well settled, as applying to both kinds of sale. Such is the law of this Court. See *Worthey et al. vs. Johnson et al.* 8 Geo. R. 241, 242, and the authorities there referred to. The whole subject is discussed by Chancellor Kent, in *Davore vs. Fanning et al.* in an opinion which is unsurpassed for its learning and ability, and in which it is settled that it makes no difference, in the application of the rule, that the sale was at public auction and *bona fide*, and for a fair price. 2 Johns. Ch. R. 252. Nor can there be a doubt about its application to Sheriffs. The Sheriff is a trustee for the defendant in execution, by virtue of his office. When personal property is seized in execution, he acquires a property in it. He can maintain *trover* for it, even against the defendant himself; and where real estate is levied upon, he acquires a qualified property in that. All of which he holds in character of trustee for the owner; and being trustee, the obligations and disabilities of a trustee devolve upon him. 3 Binn. 54. 2 Johns. Ch. R. 252. 2 Fonbl. 447, note.

If the Sheriff be viewed in the light of a mere agent, he cannot purchase at his own sale. He is the agent of the defendant in execution; appointed by the law, for the purpose of selling his property to the best advantage and to the highest bidder. His principal is entitled to his best ability and his perfect integrity in the discharge of the duty which the laws devolve upon him. The law of agency is, that the principal bargains for the exercise of "the disinterested skill, diligence and zeal of the agent for his exclusive benefit." He can have no interest and do no act adverse to the interest of his employer, or incompatible with the application of his best skill, zeal and diligence to the promotion of that interest. The privilege to an agent of buying the property he is engaged to sell, is utterly incompatible with the obligations owing to his principal. The interest of the principal is that he obtain the highest price, and it is the duty of the agent to sell it for the highest price. It is the interest of the purchaser to buy at the lowest price, and he is presumed to bid with reference to

his interest. *Emptor emit, quam minimo potest; venditor vendit quam maximo potest.* If, then, the Sheriff, who is the agent of the defendant, were permitted to purchase at his own sale, his duty to his principal and his own interest would stand in direct opposition. Either he must violate the duty which he owes to his principal, or exercise a virtue rare amongst men—that is, sacrifice his own interest to that of another. To avoid this collision of interest, and to prevent a temptation to infidelity in his trust, the law imposes upon him a positive prohibition. It is well settled, that an agent employed to sell, cannot himself become the purchaser; and an agent employed to buy, cannot himself become the seller. 1 *Paley on Agency*, by Lloyd, 33, 34, 37. 3 *Chitty on Com. and Manuf.* ch. 3, p. 216, 217. 1 *Livermore on Agency*, ch. 8, §6, p. 416 to 433. 1 *Russ. & M.* 53. S. C. 2 *M. & K.* 819. 6 *Pick.* 196. 5 *Paige*, 650. 13 *Vesey*, 103. 2 *M. & Craig.* 374. 6 *Lou. R.* 407. *Story on Agency*, §§210, 211.

This reasoning applies with more than ordinary force to the Sheriff, who is the appointee of the law and a *public agent*, and because he is not alone the agent of the defendant, but also of the plaintiff in execution. He is the plaintiff's agent to collect his money by the sale of the defendant's property. It is in many cases the interest of the plaintiff that the property shall sell for the highest price, as where the whole property of the defendant, at a fair price, is either barely enough or not enough to pay his judgment. Any infidelity in the Sheriff in such cases, in not bringing the property fairly into market, is an injury to both plaintiff and defendant, and he violates his duty to both. The right to purchase is in contravention of the policy of the law. The State has a right to require skill, diligence and fidelity in her agents. The paramount good of the whole people requires that she should exact all these things. To secure them, it is wise to prohibit the Sheriff from buying. It is her duty so to regulate the execution of the laws, as to prevent injustice to the citizen, and to remove temptations from those who are chosen to execute them. The Sheriff *accepts* office—it is not forced upon him. He cannot, therefore, complain of the disabilities which are incident to it. All these considerations derive strength from the

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fact that, at Sheriff's sales, there are peculiar facilities for the officer to perpetrate frauds without detection. This facility to do wrong, and this difficulty of detection, give almost resistless force to the temptation. The disability of a selling agent of the Court, to purchase property which he is required to sell, was held by the *House of Lords*, in the case of the *York Buildings Co. vs. McKenrie*, which Judge *Kent* pronounces "one of the most interesting cases, on a mere technical rule of law, that is to be met with in the annals of our jurisprudence. 8 *Brow. P. Cas. by Tomlin's App.* It vindicates the doctrine we now hold, the more especially as the agent of the Court, appointed in that case to sell the property of an insolvent company for the benefit of creditors, occupied the position which the Sheriff occupies in this case. It is our judgment, therefore, that a purchase by a Sheriff is absolutely void, and yields to the title of another, acquired by a subsequent sale of the same property.* In *Barker vs. Marine Ins. Co.* Judge *Story*, in pronouncing upon the validity of a sale by the master of a ship, acting as agent for the owners, where he became the purchaser, says, "As to the first point, it appears to me that the sale wrought no change in the title of the property, whatsoever. *It was a merely inoperative Act, leaving the property exactly where it found it.* It is impossible that a person can be, at the same time, buyer and seller; and a person who acts as agent in selling, cannot, upon the known principles of law, become a purchaser at the sale." 2 *Mason's R.* 371. See, also, 1 *Murph.* 35. *C. & N.* 550. 5 *B. Munroe's R.* 337. 5 *Conn.* 475. 3 *Bibb*, 450. 1 *Bailey, S. C. R.* 467.

The Court below ruled in accordance with our opinions upon this point, but held that the Sheriff might act as agent of an absent person, and that a purchase made by him, as such agent, would be valid. To this latter opinion we dissent. If the policy of the law prohibits a Sheriff from buying on his own account, I do not see how it is competent for him to purchase as the agent of another. He can do nothing for himself or for another, which is incompatible with his duties as Sheriff. We have seen what

*See Act of General Assembly, 1850, (*Pam.* 369,) affirming this doctrine by legislative enactment.—[RER.]

they are. His skill, diligence and fidelity belong to the defendant in execution. He may not be in this latter case subject to the same temptations to do wrong, that he is subject to when he buys for himself. This is true; but still the duty which he assumes as agent for the buyer, is incompatible with the duty which he has assumed as agent for the seller. If acting under a general and unrestricted power to buy, at auction, he must be understood as charged with the duty of buying as low as possible, whilst, at the same time, it is his duty, as agent of the seller, to make the property bring as much as possible. Here is a direct antagonism of position and duty, and involves, almost necessarily, infidelity to one or the other of his principals. His first obligation is to the seller, and the law will not permit him to place himself in a position which subjects him to the chances of violating that obligation—its policy will not allow it. “If A (says Judge Story) should employ a broker to sell goods for him at the highest price he could get, and his judgment should be confided in, and B should, at the same time, employ the same broker to purchase the like goods, at the lowest price for which they could be obtained, it is plain, that if this mutual agency were conceded, it might operate as a complete surprise on the confidence of both parties, and would thus be a fraud upon them. Indeed, it would be utterly incompatible with the duties of the broker to act for both under such circumstances, since, for all real purposes, he would be both buyer and seller, and the law will not tolerate any man in becoming both buyer and seller, where the interests of third persons are concerned.” *Story on Agency*, 31, 32. And again, he says, reasoning upon the inability of an agent to become a purchaser, “For the like reason, an agent of the seller cannot become the agent of the purchaser in the same transaction. *Story on Agency*, 203. See, also, *Paley on Agency*, by Lloyd, 33, note 3. *Wright vs. Dunnat*, 2 Camp. 203. 2 *Chitty’s R.* 205. These principles apply to Sheriffs, and the policy of the disability in their case is very manifest. The opinion of the presiding Judge was a general one, that a Sheriff could, at his own sale, become the agent of an absent purchaser. It, therefore, asserted his pow-

er to act as a *discretionary* agent, to buy at his own sale. From the facts of the case, we conclude that the Court meant to go that length; and it is that opinion that we reverse, whether the Sheriff could not act as the agent of a purchaser, to make a *definite* bid, or otherwise, where no discretionary powers are conferred, are not questions made by this record.

[2.] The Court also instructed the Jury, that a person could *assume* an agency, and if his acts are ratified, they will become valid. This is true of all who can, by law, become an agent. It is generally true. The Court, however, applied the rule to the Sheriff in this case. As to him it is not true. He cannot become, as I have attempted to show, an agent for a purchaser at his own sale. If he cannot act as agent by appointment, he cannot be made an agent by ratification. This requires no argument and no illustration; and in this particular, we think the Court erred.

Since the sale which gave rise to this controversy, the Legislature has passed an Act prohibiting a Sheriff from becoming a purchaser at his own sale, making the sale void and subjecting him to punishment if he violates the law. This Act shows the view of the General Assembly as to the policy of such purchases.

[3.] The presiding Judge decided, that a sale of property under execution by a junior *fi. fa.* defeated the lien of an older judgment upon the same property; which decision is also excepted to. If this question were now made for the first time, in this State, we should be compelled to hold differently, but inasmuch as for many years the decisions of our Courts have been in accordance with the ruling of the Court below, we affirm the decision. By Statute in Georgia, judgments bind all the property of the defendant from their date. That judgment, which is prior in time, is superior in lien. This is true of all liens. Liens can only be defeated by express waiver, or by some act of the party which amounts to a waiver. "The principle (say the Supreme Court of the United States, through Ch. J. *Marshall*, in *Rankin & Schatrell vs. Scott*, 12 *Wheat.* 177) is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject which it binds, unless the lien be *intrinsically* defective, or be displaced by some act of the party

holding it, which will postpone him in a Court of Law or Equity to a subsequent claimant. The single circumstance of not proceeding upon it, until a subsequent lien has been obtained and carried into execution, has never been considered such an act." The lien of a judgment is statutory, and is as strong as the lien of a mortgage. A junior mortgage, foreclosed, does not, by a sale of the mortgaged property, displace the lien of an older mortgage. In that case, the property is sold subject to the senior lien, and the purchaser buys with that understanding. The mortgage of older date is recorded, and that is notice to all the world. Why should the rule be different in case of judgments? They are founded on proceedings of record—they are themselves recorded. A consent to the sale by the older judgment creditor, would unquestionably defeat its lien. So, also, if it comes in (as it may do) and receives the money raised by the sale, it could not afterwards sell the property. 6 *How. M. R.* 530. *Ibid*, 543. *Ibid*, 536. *Ibid*, 554. 7 *Ibid*, 397. 2 *McLean*, 78. *Wright*, 47. 13 *Johns.* 462. *Ibid*, 533. 12 *Wheat.* 177.

But this is not an open question here. The decision of the Judge, in this case, has been the law of our Courts for years. Under that law, the title to a vast amount of property has passed. The Legislature has acquiesced in it. When a Statute has, by a long series of decisions, received a construction which the people have acted upon, and in which the Legislature has acquiesced, we do not feel at liberty, not feeling it to be an imperious obligation, to disturb that construction—more especially in cases where, as in this, serious injury would result to citizens who have rights originating under that construction. We leave the error for the consideration of the Legislature. We recollect no instance, in this State, in which the rule has been settled different from the decision in this case. In the Eastern Circuit, which is the oldest in this State, upon the authority of Judge *Law*, the decisions have been to this effect. *R. M. Charleton's R.* 327.

Let the judgment be reversed.

No. 34.—WILLIAM E. JACKSON & Co. plaintiffs in error, vs.
WILLIAM COX, Sheriff, defendant.

[1.] A defendant arrested under *ca. sa.* and allowed prison bounds under the Statute, is still in the custody of the Sheriff, and he must place him in confinement at the end of six months, without any special order.

Rule *nisi*, in Gilmer Superior Court. Decided by Judge WRIGHT.

The plaintiffs in error had caused one William T. Banks to be arrested under a *ca. sa.* by the former Sheriff, and Banks had given bond and was allowed the benefit of prison bounds under the Statute.

Before six months from that time had expired, the defendant in error became Sheriff, and at the end of the six months from the time that said Banks had been allowed prison bounds, Cox failed to place him in close custody, but suffered him to remain in prison bounds.

Plaintiffs moved a rule, that Cox should pay their debt, which the Court refused, holding that they should have notified the Sheriff to take Banks into close custody if they desired him to do so.

To which decision, plaintiffs in error excepted.

MARTIN, for plaintiff in error.

OVERBY, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] By the Act of 1820, (*Prince*, 289) any person arrested and committed to jail upon civil process, upon giving security to keep within prison bounds, shall have liberty to remain therein without the jail, for six calendar months, and no longer. I cite the substance of what the Statute was intended to be, and

not what is; for by reference to it, it will be found that it is, by implication only, that we arrive at its meaning.

The question made by the record before us is, whether at the expiration of the *six months*, it is the duty of the Sheriff, or other arresting officer, to re-commit the prisoner to jail, without first obtaining a special order from the Court for that purpose.

We believe that the Sheriff is bound to re-commit the prisoner, and that he will make himself personally liable if he fails to do so. 2 *Tuck. Com.* 351.

The prison bounds established by the Statute, are to be considered an extension of the four walls of the jail, and the party within the ten acres is, to every legal intent, a prisoner still in the custody of the officer under the *ca. sa.* There is, therefore, no *new* arrest, but a mere return to the close confinement which was suspended for a limited period; by operation of the bond. *Butley vs. Calton et. al.* 1 *Ohio Rep.* 25.

Were a special order of the Court necessary, the liberty of the bounds, instead of being limited, as it is by law, to *six calendar months*, would, in almost every case, be extended to a longer period; and should the arrest be immediately ensuing a term of the Court, it might reach almost to one year, and thus defeat the express provision of the Statute. No construction, therefore, can be maintained which will produce such a result.

Judgment reversed.

No. 35.—A. MAULDEN, plaintiff in error, vs. JOSEPH THOMAS *et al.* defendants.

[1.] Where a deed conveyed a negro to certain parties and added, "Provided, always, that this *deed of gift* shall be the right and property of J T, until M T arrives at the age of twenty-one years:" *Held*, that J T took no title to the property conveyed.

[2.] The laws of North Carolina, requiring deeds of gift to be *proven* and *registered* in one year, or else to be void: *Held*, that the *registration* of a deed is not sufficient proof of its *probate*.

Trover, in Habersham Superior Court. Tried before Judge JACKSON, April Term, 1850.

The facts of this case are as follows: On the 26th day of March, 1827, one Richard W. Roberts made a deed of gift in writing, in Rutherford County, N. C. to Joseph, Emily and Mary Thomas, of certain negro property. The deed contained the following proviso: "That this deed of gift shall be the right and property of Joseph Thomas, Sr. (the father of said Joseph, Emily and Mary) until the said Mary Thomas arrives at the age of twenty-one years, or at the death of the said Joseph Thomas, and Lydia, his wife."

Joseph Thomas, Sr. sold the negro named in the deed, and in 1847, (Mary Thomas having arrived at age in 1844,) Joseph Thomas and others, claiming under the above deed, commenced their suit against Maulden, to recover from his possession the negro named in the deed and her increase. The plaintiffs introduced the deed and produced an exemplification from the Register's office of Rutherford County, showing that the deed was registered, May 7, 1828. They produced no evidence that the deed had been proven according to the Laws of North Carolina, except an entry on the back of the deed.

The Court below held, that under the deed, Thomas, Sr. took an estate for years, with remainder to the others; and the Court also held, that the registration of the deed, in North Carolina, was sufficient evidence of probate under the laws of that State.

To these decisions defendant excepted.

J. W. H. UNDERWOOD, PEEPLES, OVERBY and DOUGHERTY, for plaintiff in error.

HILLYER, COBB and HULL, for defendants.

By the Court.—WARNER, J. delivering the opinion.

The two main questions involved in this case, and which, in our judgment, must control it are—

1st. The proper construction to be given to the deed of gift executed by Richard W. Roberts, under which the plaintiffs claim title.

2d. Whether the *registration* of the deed in the State of North Carolina afforded sufficient evidence, in the Courts of this State, of its *probate*, under the laws of that State, to constitute a valid transfer of the property.

[1.] Richard W. Roberts, the donor, by deed of gift, on the 26th March, 1827, in consideration of natural love and affection, conveyed to Joseph, Emily and Mary Thomas, children of Joseph Thomas, and Lydia, his wife, “one negro girl named Diana, about twelve years of age, to have and to hold and *enjoy* the said negro, unto the aforesaid Joseph, Emily and Mary Thomas, their executors, administrators and assigns, to the *only proper use and benefit of them and their assigns forever*: provided, always, that this *deed of gift* shall be the right and property of Joseph Thomas, Sr. until the said Mary Thomas shall have arrived at the age of twenty-one years, or at the decease of the above Joseph Thomas, and Lydia, his wife.” The donor then covenanted to warrant the aforesaid negro girl and her increase, unto the said children forever. The deed of gift was attested by two subscribing witnesses—Adam Whisenhunt and K. L. McCuney. It is insisted, in affirmance of the judgment of the Court below, that according to a fair construction of the deed of gift, Joseph Thomas, Sr. took an estate for years, and the plaintiffs an estate in remainder, at the termination of the said estate for years. According to the view which we are constrained to take of this

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deed of gift, after the most careful consideration of it, no interest whatever in the negro Diana, and her increase, was conveyed thereby to Joseph Thomas, Sr. If such was the intention of the donor, he has failed to employ sufficient words to declare clearly and legally his meaning. 2 Bl. Com. 298. In the construction of deeds, the first rule is, that the intention of the parties is, if possible, to be supported; and the second rule is, that this intention is to be ascertained by the deed itself—that is, from all parts of it taken together—but omissions cannot be supplied from arbitrary conjecture, though founded on the highest degree of probability. *Dismukes vs. Wright*, 4 Devereux & Battle's R. 207.

There are no words in the deed which convey the negro to Joseph Thomas, Sr. but on the contrary, she is expressly conveyed to the children, Joseph, Emily and Mary Thomas, to their *only proper use and benefit, forever*. The plaintiffs base their claim to the property on the proviso in the deed: "Provided, always, that *this deed of gift* shall be the right and property of Joseph Thomas, Sr. until the said Mary Thomas shall have arrived at the age of twenty-one years, or at the decease of the above Joseph Thomas, and Lydia, his wife." We give effect to this part of the deed, by holding that it was the intention of the donor, that Joseph Thomas, Sr. should have the *custody* of the deed of gift, as the agent or next friend of the children, for their benefit, until Mary, the youngest child, should arrive at twenty-one years of age, or so long as the said Joseph Thomas, Sr. and his wife, Lydia, should live. This view of the question is strengthened by the facts disclosed upon the face of the record. Richard W. Roberts, the donor, was the half brother of the donees, (Joseph Thomas, Sr. having married his mother,) who were infants when the deed of gift was executed. Who so competent to have the custody and control of the deed, for the benefit of his infant children, as their father? Who so likely to preserve it, and deliver it to them when Mary, the youngest child, arrived at twenty-one years of age, as he? Besides, if it was the intention of the donor to have given an estate in the negro to Joseph Thomas, Sr. for his benefit and the benefit of his mother, as he

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been argued at the bar, would he have deprived them of this benefit in their old age, when Mary should arrive at twenty-one years of age? If it was the intention of the donor to have conveyed an estate in the negro to Joseph Thomas, Sr. for the benefit of his mother, why was it conveyed to the step-father alone, without making any separate provision for his mother? If such had been the intention of the donor in executing the deed, it is but reasonable to presume, that his affection for his mother would have been equally as strong as that entertained by him for his step-father. No such intention as that contended for, can, in our judgment, be legitimately gathered from the instrument, or from any *extrinsic* circumstances disclosed by the record.

[2.] In regard to the second question—was there sufficient evidence, on the face of the deed of gift, to show that it had been proved, in accordance with the law of North Carolina, where it was executed? By the Statute Law of North Carolina, a deed of gift of a slave is not valid, “unless the writing by which the title to such slave is transferred, shall be *proved or acknowledged upon oath*, either before one of the Judges of the Supreme Court, or of the Superior Court, or in the *Court of the County*, and registered in the office of the public Register of the County where the donee resides, within one year after the execution thereof.” See *the Act of 1806, Revised Statutes of North Carolina*, 230. There is *no probate on oath*, by either of the subscribing witnesses to the deed, apparent on the face of the record from North Carolina, or upon the original deed.

The deed was executed on the 26th day of March, 1827. On the back of the deed the following entries appear:

“STATE OF NORTH CAROLINA, } *April Term, 1828.*
Rutherford County. }

The within deed was proved in open Court, by Adam Whis-
ehunt, Jr. recorded and ordered to be registered.

Certified by

J. CAVTON, Clerk.”

To constitute this a valid deed, by the law of North Carolina,
it must have been *proved*, or *acknowledged upon oath*, before a

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Judge, or in the *Court of the County*. The certificate of the Clerk does not show that the deed was proved in the *County Court*, nor does it appear of ~~what~~ *Court* he was Clerk. Whether this certificate of the Clerk would be sufficient evidence of the *probate* of the deed, according to the *usage* and practice of the *Courts* in North Carolina, has not been made to appear; but according to the ruling of the Supreme Court of that State, in *McNill vs. McNeil*, (2 Dev. Law Rep. 394,) we infer that it would not be held sufficient in that State. It has been urged, however, that inasmuch as the deed has been registered, the Court is bound to presume that it was duly proved in the County Court.

The Register of Rutherford County certifies, that the deed was duly entered in the public Register's office for said County, on the 7th day of May, 1828. The validity of the deed is made, by the Statute of North Carolina, to depend upon its *probate* before certain specified judicial officers, or in a particular Court. The mere registration of the deed does not, affirmatively, establish the fact of its *probate* in the particular Court required by the law, and such fact not appearing, the Statute, speaking like a tyrant, declares that the deed is *invalid*, and must be obeyed.

We express no opinion with regard to the Statute of Limitations, preferring to leave that an open question to be adjudicated by the Court below, in accordance with such a case as shall be made on the new trial of the cause, in conformity with the judgment which we now render, reversing the judgment of the Court below, on the grounds already stated.

Let the judgment of the Court below be reversed, and a new trial granted.

Keith vs. Wheelchel.

No. 36.—M. A. KEITH, plaintiff in error, vs. DAVIS WHEELCHEL, defendant in error.

[1.] A surety on a claim bond against whom judgment for damages and costs has been given, together with the claimant, and who has paid off the *fi. fa.* is entitled, under our Statute, to control the *fi. fa.* for the purpose of re-imbursing himself out of the effects of the principal claimant.

Claim, in Hall Superior Court. Tried before Judge JACKSON, September Term, 1850.

The facts of this case are as follows: M. A. Keith was security of Redding Pinson on a claim bond in a case tried in Cherokee Superior Court, in which the Jury had found damages, and judgment was entered up, and *fi. fa.* issued against Pinson and Keith for the damages and costs.

This *fi. fa.* was paid off by Keith, the security, who afterwards caused it to be levied on a lot of land in the County of Hall, as the property of Pinson. The land was claimed by Davis Wheelchel.

On the trial, the plaintiff, Keith, offered the *fi. fa.* in evidence. It was objected to on the ground, that the security on a claim bond, where judgment had been given, and *fi. fa.* issued for damages and costs, and who had paid off the *fi. fa.* had no right to use the *fi. fa.* to re-imburse himself out of the effects of the principal claimant. The Court so held and rejected the *fi. fa.*

To which decision the plaintiff in execution excepted.

HILLYER and OVERBY, for plaintiff in error.

PEEPLER, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] By the 4th section of the Act of 1826, sureties on bond, note or other contract, if sued thereon, are authorized to make

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special defence, and if it is made to appear to the Court, that they are sureties only, and not interested in the consideration of the contract sued on, the judgment is to be entered accordingly, and the sureties are entitled to control the execution against their principal in the event of their paying it. It is not necessary, in order to charge a surety on a claim bond, to sue upon the bond; but in cases of claim where there is a verdict subjecting the property, and for damages, judgment for damages may be entered up by the plaintiff on execution against the principal and surety, upon motion. Such has been the decision of this Court.

Now, this being so, it is to be conceded that the surety on the claim bond has no means of availing himself of the privileges of defence given by this section of the Act of 1826, and as the right of control depends upon the fact of a suit against him and a defence, although he is surety *on bond*, he is not by this section entitled to the control of the execution against his principal for remuneration. A subsequent Act passed in 1831, goes farther: By that Act, if sureties on bond, note or other contract, *shall fail, at the trial*, to make the defence authorized by the Act of 1826, they shall, nevertheless, be entitled to control the execution against their principal, where they pay the debt, provided they make it satisfactorily to appear to the Court, from which the execution issued, that they were *bona fide* sureties only upon the original bond, note or contract, which was the foundation of the judgment and execution. In my judgment, the surety on the claim bond is entitled to the control of the execution against his principal under this Act of 1831. It is contended that he is not, because, although he is a surety *on bond*, yet the sureties contemplated are only such as, by the previous Act of 1826, are liable to suit, and upon that suit are entitled to make special defence; and inasmuch as sureties on claim bonds are not liable to suit, (judgment by the ruling of this Court passing against them by motion,) and cannot therefore make defence, *therefore*, they are not embraced in this Act of 1831. In other words, the condition precedent to the privilege or right conferred by the Act of 1831 upon sureties, is that they occupy, in the law, such

position as will subject them to a suit in that character. This reasoning is not satisfactory to my mind. The special defence spoken of in the 4th section of the Act of 1826, is not a duty or necessary legal obligation, but it is a *privilege*, which the surety, *when sued*, may avail himself of or not. *When sued* on the bond, note or other contract, the Act declares *that it shall and may be lawful for him to make defence, &c.* If there is no suit, he has, by that Act, no right of control. If he is sued, then it is lawful for him to make the defence, and if he makes it, he is entitled to the control, and if he does not, he is not entitled to the control. Such is his position under the Act of 1826. The Act of 1831, considering him in the position he has placed himself in, by failing to make the defence, gives him the control, wholly, irrespective of that Act. The disability under which the surety labored, under the Act of 1826, was this—failing to make defence, he could not afterwards, in any other way, get the control. The Act of 1831 removes this disability, and says that he shall be entitled to the control. That is to say, all sureties who are *disabled* by not complying with the Act of 1826, are *enabled* by the Act of 1831. If such sureties are relieved by the Act of 1831, and are declared entitled to the control, *a fortiori* are sureties of the same class, and so described in the Act of 1831, who have never come under such disabilities, entitled to the control. The surety on the claim bond has never come under this disability, because, whilst he is *surety on bond*, in the language of the Act, yet he is not liable to suit on it, and is not, therefore, put upon his election to make defence or not. How absurd to give to one surety *on bond*, who has failed to provide for himself, as he may do under the law, the right of controlling an execution against his principal for his remuneration, when he has paid it, and to deny that right to another *surety on bond*, who has no such right of providing for himself, and who has made no such failure. The condition of him who is in laches is made better than that of him who is not in laches, upon this construction. The reasoning to support it may be to exhibit its injustice presented thus: A, a surety on bond, although described as a beneficiary in the Act of 1831, is not entitled to its benefits, because

B, another surety on bond, but who occupies certain legal relations to the rest of the world which A does not hold, is entitled to the same benefits which he has forfeited by neglect, under the previous Act of 1826. If it be conceded that the letter of the Act of 1831 raises some doubt about its application to sureties upon claim bonds, it will not be denied that they fall within its reason and spirit. There is no reason, whatever, why sureties, generally, should be enabled to control executions against their principals, whilst this class is denied that power. Indeed, the inability of these sureties to defend as such, would seem to be a good reason why they should be enabled to control the execution by a proceeding subsequent to the judgment. The obvious intent of the Act of 1831 is to enable all persons who are sureties, and against whom judgment has passed, and who have paid the debt, upon these facts being made to appear, to control the judgment against their principal for indemnification. Against the surety on a claim bond in this case, judgment has been entered, and upon his complying with the requirements of the Act by the prescribed proceeding, it seems to me that he must be, under that Act, entitled to the control. This construction is in accordance with the whole drift of our legislation in relation to this subject. Sureties are, moreover, a favored class in the law, and Acts for their benefit are to be liberally construed.

If I am wrong, however, in this construction of the Act of 1831, we all agree that the surety, in this case, is authorized to control the execution under the Act of 1810. The 5th section is in the following words: "When it shall appear, by the Sheriff's return *on any execution or executions*, that the same has been paid by a security or securities, it shall be the duty of the Clerk to make such entry on such docket book, and such security or securities shall have the use and control of said execution, for the purpose of remunerating him or themselves out of the principal for whom he or they stood security." The terms of this Act are very general. They embrace *any* execution paid by a surety, which is so returned by the Sheriff. It is made the duty of the Clerk to transfer the entry to his docket book. Then the Act proceeds to declare that the surety shall have the control. The

construction of this Act has been, that it applies only to sureties of record—such as sureties on appeal and upon stay of execution. Where the record shows the relation of principal and surety, there no proceeding is necessary to establish the fact of suretyship. In all other cases, at the time of the passage of the Act and since, until the Act of 1826, this relation could be established only by suit by the surety against his principal. This is, without doubt, the true construction. Surety on claim bond, is a surety of record. If not before, since the decision of this Court, authorizing judgment against him, upon motion, his bond is in the nature, after the verdict for the plaintiff in execution, of an acknowledgment of record. The bond, the proceeding on the claim, and the judgment against him, as surety, are all of record. The case, therefore, falls within the letter and the received construction. There is nothing inconsistent with this idea in the subsequent Acts relative to sureties on appeal and upon stay of execution. They are in relation to them alone, and do not embrace sureties on claim bonds. As to them, they are enlarging Statutes, and they leave the Act of 1810 in full force as to other sureties of record, of which class the surety on claim bond, as we have seen, is one.

Security, upon putting in claims, was required by the Judiciary Act of 1799, which Act, in this regard, was superseded by the Act of 1821. It is, therefore, reasonable to suppose that the Legislature, in the subsequent Act of 1810, had them in view, as well as other sureties of record.

The demurrer to the admissibility of the execution in this case, was sustained upon the ground, that the surety on claim bonds could not control it for remuneration. No other question is made in the record. *Prince*, 436, 461, 470.

Let the judgment be reversed.

No. 37.—CHARLES F. McCAY, plaintiff in error, vs. JOHN DEVERS, defendant.

[1.] An executor is entitled to appeal without security, when the judgment is to affect only the assets of the decedent in his hands; *aliter*, where the judgment is against him personally, and for which he is responsible out of his own funds.

Covenant, in Clarke Superior Court. Decided by Judge JACKSON, August Term, 1850.

This was an action brought on a contract made by McCay and Devers, for the construction of a mill-dam, by Devers, at Princeton Factory, in Clarke County. The declaration was brought against "Charles F. McCay, one of the executors of William Williams, deceased," and the process was so directed. The declaration did not state that he was sued "as executor."

A verdict being rendered for the plaintiff, defendant appealed, without giving security, alleging himself, in the appeal, to be executor.

On the trial of the appeal, plaintiff moved to dismiss the appeal because no security had been given.

The Court held, that the action was brought against the defendant, individually, and not in his representative character, and so holding, dismissed the appeal.

Defendant offered to prove, that he was executor of William Williams, deceased; that the contract was made for the benefit of the estate, and that he was authorized, by the will, to make such contracts. Which testimony was rejected by the Court. To which decisions defendant excepted.

HILLYER, for plaintiff in error.

PEEPLES, DOUGHERTY and HULL, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Is a defendant who is sued, *individually*, upon a contract which he himself has made with the plaintiff, entitled to appeal

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from a verdict rendered against him, without giving security, by proving that the contract on which the action was brought, was made for the benefit of the estate, which he represented as executor, and that he was authorized, by the will of his testator, to make such contracts?

By the Judiciary Act of 1799, executors and administrators are not required to give security upon entering an appeal. *Prince*, 426. In every case which may arise, we apprehend the true test to be this—will the judgment or decree affect only the assets of the decedent in the hands of the party? If so, he is entitled to appeal, under the Statute, without giving security, otherwise, the appeal bond would bind him, personally, and render him liable beyond the assets.

But where the judgment or decree *may be* personal, and a *fortiori* where it *must* be so, as in the present case, and for which he will be held responsible out of his own funds, whatever remedy over he may have at Law or in Equity against the estate, there is no more reason for allowing him the privilege of appealing, without security, than to allow it to any other person. The contract being made with him, *personally*, he must litigate all controversies arising out of it, in the same capacity. The just rights of the adverse party requires this.

Judgment affirmed.

No. 38.—IRA R. FOSTER, plaintiff in error, vs. THE JUSTICES OF THE INFERIOR COURT OF CHEROKEE COUNTY, defendants.

[1.] It is a condition precedent before a County Treasurer can enter upon the duties of his office, that he should give bond and security, and not having done so, he does not legally hold the office.

[2.] Before the Inferior Court can issue execution against a County Treasurer for a balance in his hands, ten days' written notice is required by Statute to

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be given him, and the order of the Court under which the *fi. fa.* is issued, must show that such notice has been given.

[3.] When the Inferior Court have passed an order, requiring the Clerk to issue *fi. fa.* against the Treasurer, but the Clerk failed to record such order: *Held*, that it is competent for the Inferior Court, after the *fi. fa.* has been issued, to place the order on the minutes, *nunc pro tunc*.

Rule, in Cherokee Superior Court. Decided by Judge HOOPER, September Term, 1850.

This was a rule against the Sheriff to pay over certain money arising from the sale of the property of one H. H. Waters. The money was claimed by the Justices of the Inferior Court, on a *fi. fa.* issued by said Court, in 1845, against Waters, for a balance in his hands as County Treasurer. Ira R. Foster claimed the money on a *fi. fa.* of younger date, and contended that the *fi. fa.* from the Inferior Court was void.

It appeared that no order of the Inferior Court, directing their Clerk to issue the *fi. fa.* was on record until 1850, when a rule was passed, reciting that such an order had been given previous to the issue by the Clerk of said *fi. fa.* but that, whereas the Clerk had failed to put said order on the minutes, that the same be put on the minutes, *nunc pro tunc*. It also appeared, that no notice had been given to Waters, previous to issuing the *fi. fa.* by the Inferior Court, because he was, at that time, out of the State. Waters had never taken an oath of office, nor given bond as County Treasurer.

For these reasons Foster contended that the *fi. fa.* of the Inferior Court was void.

The Court decided otherwise, and ordered the money to be paid to the Inferior Court, and counsel for Foster excepted.

J. W. H. UNDERWOOD, for plaintiff in error.

OVERBY, for defendant.

By the Court.—WARNER, J. delivering the opinion.

The only question involved in this case, is the validity of the execution issued against Waters, as County Treasurer of Cher-

okee County. Two of the objections taken to the execution are, in our judgment, *fatal* to it.

[1.] The first section of the Act of 1825, authorizing the appointment of a County Treasurer, declares, "That he shall, before he enters upon the duties of his office, give bond, with security, to the Justices of the Inferior Court, for the faithful discharge of his duty, in such sum as they shall prescribe, not less than double the amount of the funds in hand, and the annual revenue of the County, and shall, moreover, take an oath well and truly to discharge the duties of his office." *Prince*, 185. The first objection to the execution is, that Waters never gave any bond, with security, for the faithful discharge of his duty as County Treasurer, nor took the oath of office, as required by the provisions of the above recited Act. It appears that the records of the Inferior Court did not show that any *bond and security* had been given by Waters; or that he had even taken the oath required; nor was there any *other evidence* that he had complied with the law in that respect, and the execution issued against Waters *alone*. Before he can be considered as a County Treasurer, in the eye of the law, and perform the duties of that office, he must first have complied with the provisions of the Statute, which authorized his appointment. The giving bond and security was, at least, a *condition precedent* to his entering upon the duties of the office.

[2.] The 6th section of the Act of 1825, gives the authority to the Justices of the Inferior Court, or a majority of them, "to issue execution against the *County Treasurer* and his *securities*, for the amount in his hands, on his failing to pay or account therefor, within ten days after *written notice* from such Justices to that effect. *Prince*, 186.

The authority of the Clerk to issue the execution against Waters, is to be found in the following order or judgment of the Inferior Court: "*Cherokee County, March 14th, 1845—Ordered by the Court, that the Clerk of this Court do forthwith issue an execution against Henry H. Waters, former County Treasurer for the County aforesaid, in favor of the Justices of the Inferior Court for said County and State, for the sum of five hundred and*

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twenty-four dollars, for the amount detained in his hands and possession, with interest thereon, at eight per cent. per annum."

This being a summary proceeding, unknown to the Common Law, must be construed *strictly*. The Statute only authorizes an execution to issue against a County Treasurer, for the amount of money in his hands, *on his failing to pay or account therefor within ten days after written notice from the Justices of the Inferior Court to that effect.*

From the record in this case, it appears that Waters had gone beyond the limits of the State, and for that reason the Court below held that notice was unnecessary. It is a principle of natural justice, which Courts are never at liberty to dispense with, *unless under the mandate of positive law*, that no person shall be condemned unheard, or without an *opportunity* of being heard. *Flint River Steamboat Co. vs. Foster*, 5 Geo. Rep. 202.

The mandate of the law, in the Act of 1825 is, that the County Treasurer shall have *written notice* to account for the money in his hands, from the Justices of the Inferior Court, and upon his failing to do so, and pay over the same within ten days thereafter, an execution may issue. The County Treasurer, being out of the limits of the State, is not made an *exception* by the Act requiring the *written notice*, and the Courts cannot make it one without palpable judicial legislation:

Besides, it does not appear on the face of the judgment of the Justices of the Inferior Court, ordering the execution to issue, that any *notice*, as required by the Act, had been given to Waters, or that he was beyond the limits of the State—conceding that the latter fact would have dispensed with notice, which we hold would not have been sufficient, according to the *positive* mandate of the Statute. The judgment of the Justices of the Inferior Court is the foundation upon which the execution is based, and that judgment should show, upon its face, such facts as would authorize the execution to issue, according to the provisions of the Statutes affording the summary remedy against the County Treasurer.

[3.] We overrule the objection taken to the judgment being entered, *nunc pro tunc*, for the reason that it appears, from the re-

cord, that the judgment was regularly passed by the Justices of the Inferior Court, on the 14th March, 1845, and that the Clerk failed to enter it upon the minutes of the Court, *at that time*, as he should have done. The order of the 20th August, 1850, only directs the Clerk to enter the judgment passed on the 14th March, 1845, upon the minutes of the Court.

Let the judgment of the Court below be reversed.

No. 39.—WILLIAM J. BEAVORS, ex'r of Lucinda Winn, plaintiff in error, *vs.* WILLIAM WINN *et al.* adm'rs of Richard Winn, defendants.

- [1.] The widow of an intestate is not entitled to have advancements, made by the intestate to his children, brought into hotchpot for her benefit.
- [2.] The widow dying in less than one year after administration on the estate of her husband, without having elected to take a child's part of the real estate, her executor cannot recover it after her death.

In Equity, in Hall Superior Court. Decided by Judge JACKSON, on demurrer, September Term, 1850.

The complainant, in his bill, alleged the following facts: On the 6th day of May, 1847, Richard Winn departed this life intestate; leaving a widow, Lucinda Winn, and sundry children. William and Willis Winn became administrators of his estate. On the 23d of December, 1847, his widow, Lucinda Winn, died, having made a will, of which complainant was executor. She had, previous to her death, made no election between her dower and a child's part of her husband's estate.

Richard Winn, in his life, had made certain advancements of property or money to his children. The debts of the estate had all been paid.

The complainant prayed that the administrators of Richard Winn might pay over to him, as executor of the widow, an equal distributive share of the real estate, and also, that the advancements made to the children might be brought into hotchpot, and that he should have them taken into the account for the benefit of his testatrix's estate in computing her share of the personalty.

To this bill defendants demurred for want of equity, and the Court sustained the demurrer, and dismissed as to both the grounds alleged. To which decision complainant excepted.

HILLYER, for plaintiff in error.

DOUGHERTY, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] Under the English Statute of Distribution, the widow is not entitled to share in advancements made to children. *Ward vs. Lant, Prec. Chanc.* 182, 184. *Kircuabright vs. Kircuabright*, 8 *Vesey*, 51, 64. *Gibbons vs. Caunt*, 4 *Vesey*, 847. 2 *Black. Com.* 519, *note by Chitty*. 2 *Williams' Ex'rs*, 1070. Whilst this is conceded to be the rule in England, yet it is insisted that it is different under our own Statute of Distribution. The argument is, that in England, she has a distinct provision out of the estate, separate from, and anterior to the children, whilst here, she is entitled to an equal share of the estate with the children. From this provision of our Statute, it is inferred that she, as well as the children, is entitled to share in the advancements. This difference between our Statute and the English Statute does exist. In *Odam et al. vs. Caruthers*, this Court recognized it, and held that the widow and the children are, under our Statute, in equal degree, and are entitled to share equally in the distribution of the estate. 6 *Geo. R.* 40. But it does not follow, that because the widow and children are entitled to share equally in the distribution of the estate, that she has an interest on that account in the advancements. Upon a construction of the Act of Distribution itself, independent of the Act in relation to hotchpot, she is not

entitled to a share in the advancements, when brought in, nor can she compel them to be brought in. The error into which, as it seems to me, the learned counsel has fallen, is in the assumption that the advancement, made by a father to a child, is part of his estate, subject to distribution. If this be true, it would seem to follow, that the Act of 1804 would entitle the widow to her child's part of it. But it is not true—it is not true as to the children. They are not entitled to distribution in advancements made to a brother or sister. I must admit, that so far as this question depends upon *the Act of 1804*, if the children, unadvanced, are entitled to share in advances made to other children, as distributees, the widow must be also; because, by that Act it is declared, that “the widow and child or children shall draw equal shares” of *the estate* of the husband and father—of the realty, if she elects to take a child's part, as well as the personality, and of the personal estate, if she takes her dower. But children are not entitled to distribution in advancements, because they constitute no part of the estate of the decedent; and if they are not, then equally the widow is not. The estate subject to distribution is the property belonging to the decedent at his death. A gift of property to a child as effectually passes the title out of the parent, as any other mode of alienation. An advance, that is a transfer of property to a child, divests the parent and invests the child with the title. The property is no longer in the father. It is no part of his estate whilst he lives. He cannot revoke the title if he would. The property belongs to the child, and is subject to his debts. So, also; the title passes from the parent in case of a settlement. Clearly, then, it is no part of his estate at his death, and cannot be subject to distribution. The widow being entitled to share equally in the *estate* of the decedent only, by what right does she claim an interest in the advancement? As well might she claim an interest in property of the advanced child acquired by purchase. This view is strongly fortified by the fact, that under no law is the advanced child compellable to bring the portion given to, or settled upon him, back into the common stock, even at the instance of children. Whatever he has got, whether less or more than his propor-

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tion of the estate, he can keep—it is his own. If less, of course he would bring it back, for by so doing only, can he get his full share by the law of hotchpot. If he chooses, though, not to do so, against his interest, he has the right so not to do.

His creditors, if need be, *perhaps* might compel the return of the advancement into the common stock, in order to get at his full interest in the estate. If he has been advanced more than his share, he can keep it. The Statute takes nothing away that has been given to any of the children. *Edwards vs. Freeman*, 2 P. Williams, 443. 2 Williams' Executors, 1070.

The right to hold on, to what has been given, and that too, under the Statutes, both here and in England, is wholly irreconcilable with the idea of advancements or settlements, being part of an estate subject to distribution. In all that belongs to the estate, and in nothing else, the widow and the children share equally. Thus, the Act of Distribution leaves the widow and children their interests, both being in the estate and not in the advancements. The Legislature of 1821, knowing that, by law, the children unadvanced had no power over advancements, and perceiving the great injustice of permitting those children, who had been advanced, to come in notwithstanding, and share equally in the estate of the father, came to the relief of the unadvanced children and passed the Act of 1821. It is by that Act that they are at all interested in advancements. That Act provides, that when children have been advanced, or settlements have been made upon them in amount equal to a full share in the estate, they shall have no more; and when the advance or settlement is not equal to a full share, then they are entitled to so much of the estate as will make the shares or portions of all equal. In this Act, widows are left out. It makes provision for children alone. *The widow is left as she stood under the Act of 1804.* The Judges in convention have decided this question, as we now determine it. A similar decision has been made in South Carolina under the Statutes of that State. *Wright vs. Wright, Dudley*, 251. 3. *Dessausure*, 199. *Prince*, 233, 247.

It would seem that if the widow was entitled to share in advancements made to children, children ought to be entitled to

share in settlements made upon the wife during coverture. The rights of the parties ought to be reciprocal; but settlements made upon the wife, during coverture, are no part of the estate, and are unaffected, therefore, by the Act of 1804. Nor does the Act of 1821 at all refer to these settlements; and this is to the widow some compensation for what she loses, by being left unprovided for by the Act of 1821. Upon this point we are with the Court below, as also upon the other question made in this record.

[2.] That other question is this, can the executor of a widow, who has died before the expiration of twelve months from the granting of letters upon the estate of her deceased husband, and who did not, during her life, elect to take a child's portion of the real estate in lieu of her dower, recover a child's portion of the real estate for the benefit of her estate? Dower is an estate or interest which the law devolves upon the widow, independent of her husband, and to the exclusion of heirs and creditors. It is a life estate in one third of the lands of which the husband died seized. Our Statutes, recognizing this right of dower, gives to the widow the privilege of taking, instead of her dower, an estate in fee in a child's portion of the real estate. This privilege she is to exercise, by electing to take the child's portion within twelve months from the granting of letters testamentary or of administration on the estate of her husband. The *privilege* is conferred by the Act of 1804, and the time within which she shall exercise it, and, also, the consequence of failing to exercise it, are declared by the Acts of 1807 and 1841. By the Act of 1807, it is declared, that "it shall be the duty of all widows, within one year after the death of their husbands, to make their election or portion out of the estate of the deceased, and any such widow, so failing to make her election, *shall be considered as having taken her dower or thirds*, and shall be forever after debarred from taking any other part or portion of said estate." *Prince*, 239.

The Act of 1841 does not change this Act of 1807, except, simply, to make the year, within which she is required to elect, to commence *from the granting of letters testamentary, or of administration*; instead of from *the death of the husband*. By the

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Statute, the widow has one year within which to elect, and if election is made on the last day of that year, it would entitle her to a child's part or portion. The Statute declares that, failing to elect, she is to be considered as having taken her dower, and shall be debarred all farther or other part or portion of the estate. If, then, at the expiration of the year, she has not elected, she being still in life, she is considered as having taken her dower; so, also, at any other period within the year, up to which period she has made no election, she is considered as, at that period, having taken her dower. At all times within the year, she is considered, by the terms of the Statute, as taking her dower, unless she has furnished evidence to the contrary, by proof, of having elected to take a child's part. The choice is between dower and a child's part—she chooses to take dower, negatively, by doing nothing—she chooses a child's part, affirmatively, by declaring, in some overt act, susceptible of proof, her choice. If, then, at any time within the year she dies, not having at that time elected a child's part, the conclusion of the law is, that at that time she had elected to take her dower. She is by law a tenant in dower. She can be but that in one way, and that is by declaring her choice, instead of dower, of a child's part. That choice alone can give her another and different estate. If, then, she dies without having made such choice, she dies a tenant in dower. This is our construction of the Act of 1807. Dying a tenant in dower, the dower estate descends to the heirs of her husband. What then has her executor to do with it? Obviously, nothing.

The privilege of election is personal to the widow. She cannot transmit by will. She has not undertaken to do so in this case. The executor claims it by virtue, simply, of his character as executor. It is his duty to administer his testator's estate. A privilege to elect, which is personal to the testator, does not survive to his executor. Her heirs have no interest in the real estate of her husband, because, at her death, she was tenant in dower, and no more. They are interested only in what constitutes her estate at her death. Whether, if the widow had, in her will, declared her election, within the twelve months, such

declaration would not be held sufficient, may admit of some doubt. The law is silent as to the manner in which the declaration of her choice shall be made. I should be inclined, at this moment, to the opinion, that an election made in her will, and the will passed to record, within the year, ought to be held sufficient. The better practice, however, unquestionably is, for the widow to appear before the Court of Ordinary, and there announce her choice, and place it upon the record of that Court.

If the widow fails to elect before her death, the executor cannot elect; for then, there are no two estates between which to choose. The widow chooses between her dower, which is a life estate for her life, and a child's part in fee, but when she dies, her life estate determines. If the executor can come in after her death, and take the fee, it is not an election between that and dower, but it is an independent appropriation of an estate, in which the widow had no interest, for the benefit of her heirs. The Statute contemplates no such thing—the widow is alone its beneficiary. Moreover, if the executor may, in this case, take the child's part for the benefit of the widow's heirs, the result is—

1st. That the widow has enjoyed the dower estate.

2d. Her heirs get the fee, in a child's part, and

3d. The heirs or distributees of the husband are defeated in their remainder in fee, in the estate in dower, upon the death of the widow. These things are in conflict with the law and with the justice of the case. It is argued that the law gives twelve months to make the election—that the widow died before the year expired, and it may have been her purpose to elect, and from ought that appears, she would have elected, had she lived within the year, and *therefore*, the executor ought now to elect for her. This reasoning is plausible, but upon examination, evaporates into thin air. Those considerations, which I have before urged, are conclusive against it. *Non constat*, that she would have elected had she lived. Her purpose to do so does not appear, and that which does not appear, does not exist. The contrary does appear; for by the terms of the law, until she does in fact elect, she is held to have taken her dower. In this case she did not elect; she is, therefore, held to have taken

Strickland *vs.* Maddox and others.

her dower. She takes the risk of dying within the year, and she must, at the peril of losing the child's part, elect before she dies.

Let the judgment be affirmed.

No. 40.—HENRY STRICKLAND, plaintiff in error, *vs.* POSEY MADDOX *et al.* defendants.

[1.] Where the Petit Jury, in a claim case, have returned a verdict, giving damages against the claimant, and the verdict is appealed from, and pending the appeal, the claim is withdrawn: *Held*, that the case goes on, as to the question of damages, and stands on the docket for trial as before, and no execution can issue for the damages until the appeal is disposed of.

Rule, in Cherokee Superior Court, Decided before Judge HOOVER, August Term, 1850.

The facts of this case are as follows: A claim case between Henry Strickland, plaintiff in *fi. fa.* H. H. Waters and I. R. Foster, defendants, and Posey Maddox, claimant, was tried before a Petit Jury, August Term, 1846, of Cherokee Superior Court, when the Jury found the property subject, and 10 per cent. damages, for which judgment was signed against the claimant and W. P. Hammond, security, on claim bond. From this verdict, the claimant appealed, and pending the appeal, withdrew his claim.

The plaintiff in *fi. fa.* then moved the Court, that the Clerk do issue execution against the said Maddox and his security, for the amount of the damages found by the Petit Jury.

This motion was refused by the Court, and plaintiff in *fi. fa.* excepted.

BROWN and PEEPLES, for plaintiff in error.

DOUGHERTY, for defendants.

By the Court.—~~Lott~~ delivering the opinion.

[1.] Henry Strickland, having an execution against Henry H. Waters and Ira R. Foster, caused it to be levied on a lot of land which was claimed by Posey Maddox. At August Term, 1846, of the Superior Court of Cherokee County, the Jury found the property in dispute subject to the *fi. fa.* with 10 per cent. damages, believing that the claim was interposed for delay. The claimant, Maddox, being dissatisfied with the verdict, entered an appeal in terms of the law. At August Term, 1847, of said Court, the *claim* was withdrawn. Application was recently made to James Jordan, the Clerk of the Court where the cause was pending, to issue an execution upon the *first* judgment, which he refused to do. An order was then applied for, to compel a compliance with this request, which the Judge of the Superior Court refused to grant; and it is to reverse this judgment that this writ of error is prosecuted.

The *appeal* being still in Court, undisposed of, we hold that the Court was right in denying the motion. *Attaway vs. Dyer and others*, 8 Geo. Rep. 184.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,
AT MILLEDGEVILLE,

NOVEMBER TERM, 1850.

Present—JOSEPH H. LUMPKIN, }
HIRAM WARNER, } Judges.
EUGENIUS A. NISBET, }

No. 41.—CALEB C. WEEKS AND WIFE, plaintiffs in error, *vs.*
ABRAHAM SEGO, administrator, &c. defendant.

- [1.] When a particular mode or manner is pointed out, for the disposition of the separate estate of a married woman, in the marriage settlement, she cannot dispose of it in any other way, as where she had the power of disposing of her property by will, with the *consent* and *approbation* of her trustee: *Held*, she could not make a valid disposition of it by will, without the consent and approbation of such trustee.
- [2.] Where one of several parties in a cause signs an appeal bond, with security, and there are other parties who have failed to sign the bond according to law: *Held*, under the Act of 1839, that the appeal was good as to the party who had properly signed the appeal bond.
- [3.] Where a party makes application for letters of administration on the estate of a decedent, and his application is resisted by other parties claiming to have a will, the party making the application for the letters of administration will be considered the promovant in the cause, and will be entitled to open and conclude the argument of the cause to the Jury.

Appeal from Court of Ordinary. In Richmond Superior Court, June Term, 1850. Tried before Judge STARNES.

Weeks and Wife vs. Sego.

By a marriage settlement entered into 30th Dec. 1847, between William Wiggins and Sarah McCollier, the property of the latter was secured to a trustee for her sole and separate use—"the said William Wiggins, in no event, to inherit the same—with power to the said Sarah, notwithstanding her coverture, and *with the consent and approbation of her said trustee*, to sell, assign, transfer and devise, or either, all or any part of the said property at pleasure: *Provided, always*, that the said Abraham Sego shall not be liable in any way or manner for any loss, waste or mismanagement of said property not occasioned or committed by him."

After the death of Mrs. Wiggins, Abraham Sego obtained temporary letters, and applied for permanent letters of administration on her estate.

To this application, Caleb C. Weeks, in right of his wife, (formerly Amelia Atwell) filed objections, on the ground that the decedent died testate, propounded the following paper as her will:

"GEORGIA, RICHMOND COUNTY:

Know all men by these presents, that I, Sarah McCollier, of the County and State aforesaid, viewing the uncertainty of life, and the very great certainty of death, being about to leave Georgia, to travel to the State of Alabama (should I, the said Sarah, depart this life, and not return again) this is to make known to all who it may concern, that it is my will and deed, that Amelia Atwell ~~shall have~~ all that I possess in my own right, which I leave in her possession.

SARAH ~~Mc~~ McCOLLER.

mark

Signed, sealed and delivered in possession of this 10th day of November, 1842.

AMISTEAD FULCHER.

DAVID G. SALALISBURY, J. P."

To the probate, objections were filed by Sego, and Jeremiah Atwell as one of the heirs.

The Court of Ordinary ordered the will to record, and an appeal was entered by Sego, with Jeremiah Atwell as security. The appeal bond was also signed by "the heirs of Sarah McColler by their attorney, Wm. R. McLaws."

On the trial in the Superior Court, plaintiff in error moved to dismiss the appeal; on the grounds—

1st. That there was no security given according to law.

2d. That McLaws shows no authority for signing as attorney.

3d. The parties to the case below are not parties to the appeal.

The Court overruled the motion, and plaintiffs in error excepted.

Counsel for Sego then moved the Court to be allowed to open and conclude the case before the Jury. The Court held that he was the promovant, and so entitled. To this decision, the counsel for Weeks excepted.

Counsel for Weeks, after the evidence was closed, requested the Court to charge, "That if the Jury believe that, by the marriage articles, Mrs. Sarah Wiggins had authority to dispose of and devise her personal property, the consent of the trustee was not necessary to make a will, executed by her, valid."

The Court refused so to charge, but, on the contrary, charged the Jury, "That by virtue of the marriage settlement, Mrs. Wiggins had no authority to devise the property, except by the consent of her trustee; and that if there was no testimony proving the consent of the said trustee, that they must find that she died intestate."

To this charge, counsel for Weeks and wife excepted.

On these several exceptions, error was assigned.

JOHN SCHLEY, for plaintiff in error, cited the following authorities:

Liptrot, adm'r, vs. Holmes, 1 Kelly, 388. *Jacques vs. The Methodist E. Church*, 17 John. Rep. 577. *Hill on Trustees*, 272, 316, 317, 422, 424, 425. *Hulme vs. Tenant*, 1 Bro. Ch. C. 16, 20. *Essex vs. Atkyns*, 14 Ves. 542. *Standford vs. Marshall*, 2 At-

kyns, 69. 17 *Ves. Jr.* 365. 1 *Ball & Beatty*, 47. *White & Sud.*
Leading Cases in Equity, 355, 182, '7, '8, 191; '2.

A. J. MILLER, for the defendant in error, submitted the following points:

1st. The appeal from the Court of Ordinary was properly entered.

2d. Sego being the applicant for administration, and his application being contested, he was plaintiff below, and entitled to open and also to conclude, as testimony was offered by the other parties.

3d. The paper propounded, as the will of the decedent, was only "a provisional contingent disposition" of the property she left in the possession of Amelia Atwell, and became void on her return from Alabama. 1 *Vesey, Sr. Rep.* 189. *Ambler's Rep.* 557. 6 *Vesey's Rep.* 607.

4th. If it were valid, as a will, it was revoked by the subsequent marriage of the testatrix.

5th. The power of disposition, conferred by the marriage settlement, could only be exercised after the marriage. *Sugden on Powers*, 194, 349. 2 *Term Rep.* 684. 2 *Browne's Ch. Rep.* 534. *Chancery on Rights*, 285. 2 *Blk. Com.* 497, 498.

6th. That power must have been exercised in the mode authorized by the instrument giving it. *Sugden on Powers*, 264, 334. 3 *Dess. Eq. Rep.* 417. 1 *Strobhail's Eq. Rep.* 27, 114. 3 *Johns. Ch. Rep.* 77. 8 *Leigh's Rep.* 20. 4 *Yerger's Rep.* 375. 2 *Wharton's Rep.* 11. 1 *Rawle's Rep.* 231. 9 *Smede & Marshall's Rep.* 435.

7th. And the disposition should have been of the property specified in the settlement, or of the decedent's estate generally; not of unspecified property in the possession of the legatee in 1842.

By the Court.—WARNER, J. delivering the opinion.

[1.] The first question which we shall consider in this case, is the power given by the marriage settlement to Mrs. Wiggins to

dispose of her separate property. The marriage settlement secures the property to her *sole and separate use*, notwithstanding her intended coverture, and for that purpose it is conveyed to Abraham Sego, her trustee, with power to sell, assign, transfer and devise, or either, all, or any part of the property, at pleasure, with the *consent and approbation* of her said trustee.

Sarah McCollier (afterwards Mrs. Wiggins) made her will, disposing of her separate property to Amelia Atwell, by virtue of the power contained in the marriage settlement, and the only question made by the record on this branch of the case is, as to the validity of the will, *without the consent and approbation of the trustee*.

The Court below held, that the consent and approbation of the trustee was necessary to make the will valid, according to the terms of the marriage settlement; whereupon the plaintiffs in error excepted. It is insisted, on the part of the plaintiffs in error, that although there is a specific mode pointed out in the marriage settlement, as to the disposition of the separate property by will, yet that does not preclude any other mode of disposition, unless there are *negative words* restraining the exercise of the power of disposition, but in the very mode pointed out. On the other hand it is contended, that according to the true intent and meaning of the marriage settlement, she was not to dispose of her separate property without the consent and approbation of her trustee, and that not having been obtained, the will is void.

That the authorities upon this question are greatly in conflict, is readily admitted; the cases, in the language of Chancellor Kent, are discordant in the application of their doctrines, and perplexingly subtle in their distinctions. *2 Kent's Com. 165* This being an open question in this State, we therefore feel at liberty to settle it in conformity to sound principle and public policy.

If the deed of settlement *restricts* her power of disposition of that property to a *particular mode*, it is difficult to perceive, according to principle, why the prescribed mode of disposition should not be observed. When the parties stipulate, she may dispose of her property by will. It certainly cannot be under-

stood she may dispose of it by *deed*, or in any other manner she may think proper. *Expressio unius est exclusio alterius*. The *consent* and *approbation* of the trustee was intended, in this case, as a *restriction* upon her power of appointment—it was the *stipulation* of the parties; and why should they not be bound by it? This construction, in our judgment, will best protect the rights of married women, and best effect the object of marriage settlements. Mr. *Sugden*, in his treatise, speaking of the execution of powers, says: “If, therefore, a *writing* is required, a disposition, by *parol*, will be invalid, although the property might, by law, be so disposed of. If the power is required to be executed by deed to be *enrolled*, the deed must accordingly be *enrolled*—if a *particular Court* be named, *that Court* must be resorted to. If the *consent of particular persons* be required, *their consent must be obtained*.” *Sugden on Powers*, 211. 2 *Kent’s Com.* 165. 2 *Story’s Eq.* 616, note. It was urged on the argument, by the counsel for the plaintiff in error, that the principle which must control this case was settled in *Liptrot vs. Holmes*, 1 *Kelly*, 381. In that case, there was no *restriction* upon the right of the wife to dispose of her separate property in the marriage settlement, and therefore, the question was not considered nor decided in that case. In this case, the right of the wife to dispose of her separate property is *restricted* by the express terms of the instrument. The power given to her by the settlement, is not that she may dispose of her separate property, generally, by sale, transfer or devise, but that she may do so with the *consent* and *approbation* of her trustee. It was optional with the parties, when they entered into the settlement, to have imposed the restriction, or to have omitted it; but having imposed it by their contract, for good and sufficient reasons, doubtless, they must now be held bound by it. The fair and legitimate construction of the settlement is, that the intended wife should have the power to dispose of her separate property with the *consent* and *approbation* of her trustee. The fact, that it is stipulated she might dispose of it *with* the consent and approbation of her trustee, negatives the idea that she might dispose of it *without* such consent and approbation. We do not feel at liberty to reject the words, “*with the consent and approba-*

tion of *her said trustee*," as unmeaning surplussage, but to regard them as a *restraint* upon her power of disposing of her separate property, secured to her by the marriage settlement. The following cases decide, that when a particular mode or manner is pointed out, for the disposition of a married woman's separate estate, she cannot dispose of it in any other way. *Morgan vs. Elam*, 4 Yerger's Rep. 375. *Lancaster vs. Dolan*, 1 Rawle's Rep. 231. *Doty et al. vs. Mitchell*, 9 Smede & Marshall's Rep. 435. *Methodist Episcopal Church vs. Jacques*, 3 John. Ch. Rep. 77. It is true, the opinion of Chancellor Kent, in the last case cited, was overruled by the Court of errors in New York, but we think the opinion of the Chancellor is best sustained by principle and public policy, in regard to marriage settlements in this State. We do not intend to controvert the doctrine, that in a Court of Equity, a married woman, in respect to her *separate* property, is to be considered as a *feme sole*, and may have an absolute dominion or power of disposition over it, *unless her power of disposition be restrained by the marriage settlement under which she became entitled to such property*; but in this case, we hold that her power of disposition of her separate property is *restrained* by the express terms of the deed of settlement, and that the consent of the trustee was necessary to give validity to the will.

[2.] In regard to the motion to dismiss the appeal, which was assigned as a ground of error, it appears that Abraham Sego was an applicant for letters of administration on the estate of Mrs. Wiggins, which application was resisted. During the pendency of the application for letters of administration, it appears that other parties in interest were before the Court besides Sego. The appeal bond is signed by the heirs of Sarah Wiggins, by their attorney, Wm. R. McLaws, and also by Abram Sego and Jeremiah Atwell, as security. The objection is, that McLaws has shown no authority to sign the bond for the heirs—concede that is so, and yet, the Court below did not err in refusing to dismiss the appeal. Abraham Sego was the party who made the application for the letters of administration, and was one of the parties who signed the appeal bond. By the Act of 1839, where there is more than one party plaintiff or defendant in a suit, and one

party desires to appeal, he is entitled to do so, although the others shall refuse or *fail* to enter an appeal. *Hotchkiss*, 601. Sego was entitled to the benefit of his appeal under the Statute, although the others may have *failed* to do so, in terms of the law.

[3.] The other ground of error assigned to the judgment of the Court below is, that the Court permitted the counsel for Sego to open and conclude the argument to the Jury.

Abraham Sego was the applicant for letters of administration on the estate of Sarah Wiggins, and his application was resisted on the part of Weeks and wife, on the ground, that Sarah Wiggins died testate. Abram Sego was the promovant in the cause, and it was *his* application for letters which Weeks and wife resisted, on the ground they had a will. Weeks and wife were not the promovants in the cause—they did not originate the cause by propounding the will of Sarah Wiggins for probate. Had they have done so, and the other party objected to its probate and record, on the ground that she had died intestate, then Weeks and wife would have been the promovants; but inasmuch as Sego was the promovant in the cause, by making application for letters of administration, his counsel were entitled to open and conclude the argument to the Jury.

Let the judgment of the Court below be affirmed.

No. 42.—THOMAS KENT, plaintiff in error, vs. JOB HUNTER, ex'r,
&c. defendant in error.

[1.] A writ of error does not lie from a voluntary non-suit.

Debt. Warren Superior Court. Decision by Judge BAXTER,
October Term, 1850.

This was an action against Job Hunter, "as executor of the last will and testament of Bryant J. Hunter." Upon the trial, the plaintiff offered evidence to prove acts on the part of defendant, (*ne unus executor* being pleaded,) to show him an executor *de son tort*. The Court rejected the evidence, on the ground that the facts proposed to be proven were not plainly and distinctly set forth in the declaration, as required by the Judiciary Act of 1799, but decided, at the same time, that the party might amend, *instanter*, "which the plaintiff declined doing, but preferred a non-suit, which was granted. The plaintiff excepted to the decision, and submitted to a non-suit."

A motion was made to dismiss the writ of error, on the ground that no error lies where the party has voluntarily caused a non-suit to be entered.

CONE, for the motion.

L. STEPHENS, *contra*.

By the Court.—NISBET, J. delivering the opinion.

[1.] The motion to dismiss must prevail. A writ of error does not lie after a voluntary non-suit. This is not an open question with this Court, and if it was, we would, upon authority and principle, be compelled so to decide. The non-suit in this case was voluntary—it was granted upon the volunteer application of the plaintiff. It was his act. The case is out of Court by the plaintiff's motion. There was no necessity, whatever, for the

non-suit, because the Court permitted him to amend and proceed with his cause. He thought proper not to avail himself of the privilege of amending, but, in the language of the bill, *preferred* a non-suit. He now wants this Court not only to review the preceding decision of the Court as to the evidence, but to correct the wrong he has done himself by dismissing his suit, by re-instating his case.

We are not here to correct errors of parties in managing their causes, but errors of the Court in its judgments. *Mott vs. Hill*, adm'r, 7 Geo. R. 79. *Dannelly vs. Speer*, 7 Geo. R. 227.

No. 43.—SAMUEL GILMER, plaintiff in error, vs. SINGLETON W. ALLEN, defendant.

- [1.] There is no Statute in Georgia authorizing an agent to execute a forthcoming bond for property levied on by attachment.
- [2.] The defendant, by his demurrer, admits the ability of the plaintiff to sustain all the allegations in his declaration by proper proof.
- [3.] The plaintiff is not obliged to spread out his proof upon the record.
- [4.] If the declaration avers that the principal executed the bond, which is the subject of the suit, by his agent, it is sufficient.

Debt, in Elbert Superior Court. Decision by Judge BAXTER, September Term, 1850.

This was an action upon a bond given by a claimant for the forthcoming of property, levied on by an attachment. The declaration alleged, that the bond was executed by "John B. Martin, (the claimant,) signing his name by his agent, John C. Martin," and Singleton W. Allen.

Upon the trial defendant in error, by counsel, demurred to the declaration, upon the ground that there was no Statute of the

State, authorizing an agent to execute a forthcoming bond in cases of claim to property levied on by attachment, and because it did not appear that the agent had any written authority to execute the bond.

The Court sustained the demurrer, and plaintiff excepted.

CONE and VAN DEUZER, for plaintiff in error.

T. R. R. COBB, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] We are satisfied that there is no Statute in this State authorizing an agent to give a forthcoming bond for property levied on by attachment. Still, we think that the Court erred in sustaining the demurrer to the writ.

[2.] The defendant, by demurring, admits the ability of the plaintiff to sustain all the allegations in his declaration, by proper proof. As, for instance, if the demurrer is to a writ, as being within the Statute of Frauds, it concedes that the plaintiff can prove the promise, in accordance with the provisions of the Statute.

[3.] In other words, the plaintiff is not obliged to spread out his proof upon the record. If the rule was otherwise, the defendant, by his demurrer, might cut off the plaintiff's testimony, however sufficient it might be to make out his case.

[4.] The declaration alleges, that the bond was executed by the principal through his agent. This averment is sufficient, and will entitle the plaintiff to recover, provided it be sustained on the trial by competent proof.

Let the judgment be reversed.

No. 44.—JOHN D. THOMPSON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant.

[1.] Where it appeared from the minutes of the Court of a particular day, that one of the Grand Jurors had been excused for the balance of the term, and, also, that a true bill had been returned, on the same day, by the Grand Jury against a defendant, in which the name of the excused Juror was inserted: *Held*, that the minutes of the Court did not afford even presumptive evidence that the bill of indictment was found by the Grand Jury, after the excused Grand Juror had left the body of his fellow Jurors, and was not sufficient to quash the bill of indictment.

Indictment, in Wilkes Superior Court. Tried before Judge BAXTER, September Term, 1850.

For the facts in this case, see the judgment of the Court.

BARNETT, represented by A. J. MILLER, for plaintiff.

Sol. Gen. WEEMS and CONE, for defendant.

By the Court.—WARNER, J. delivering the opinion.

Two grounds of error are assigned to the judgment of the Court below in this case.

[1.] First, because the Court refused to quash the indictment, on the ground, that it appeared on the minutes of the Court that Bowdrie, one of the Grand Jurors, had been discharged from further service on the Jury, during the term of the Court, and before the entry on the minutes of the Court of the return of the bill of indictment against the defendant. Second, because the Court refused to continue the cause, on the statement of the defendant, that he expected to be able to procure the testimony of said Grand Juror, that he had been discharged prior to the finding said bill of indictment by the Grand Jury.

We are of the opinion there was no error in the judgment of the Court below in refusing to quash the indictment. The entry on the minutes of the Court on the same day that a true bill

was found by the Grand Jury against the defendant, that one of the Grand Jurors, who had been sworn, was excused for the balance of the term, did not furnish even presumptive evidence against the presence of the Grand Juror at the time the bill was found by the body of which he was a member; especially when the name of the Juror was inserted in the bill of indictment. Although excused, it was the privilege of the Juror to avail himself of it, or not, as he might think proper. We will not control the discretion of the Court below in refusing to grant the continuance of the cause.

Let the judgment of the Court below be affirmed.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT SAVANNAH,
JANUARY TERM, 1851.

Present—JOSEPH H. LUMPKIN, }
HIRAM WARNER, } Judges.
EUGENIUS A. NISBET, }

No. 45.—R. McLEOD *et al.* trustees, &c. plaintiffs in error, vs.
HENRY K. BURROUGHS, defendant.

- [1.] A legislative exposition of a doubtful law, is the exercise of a judicial power, and if it interferes with no vested rights—impairs the obligation of no contract, and is not in conflict with the primary principles of our social compact, it is in itself harmless, and may be admitted to retroactive efficiency; but if rights have grown up under a law of somewhat ambiguous meaning, then it cannot interfere with them. The construction of the old law belongs to the Courts.
- [2.] The Legislature, in a charter, declares “that it shall not be lawful for any person or persons, at any time or times, to build any bridge, or keep any ferry, on the river Great Ogeechee, within five miles, either above or below another bridge on the same stream:” *Held*, that the distance of five miles is to be measured on the course of the river.
- [3.] Grants of exclusive privileges to corporations or individuals, are to be strictly construed; and if the terms of the contract between the individual, or the corporation, and the State, are ambiguous, the ambiguity must operate in favor of the public.

Injunction, in Chatham Superior Court. Decision by Judge
H. R. JACKSON, February 20, 1850.

ready vested under it. It is not retroactive, because no one is affected by it. It becomes a new rule, and, like any other law, is obligatory upon the Courts and the people. It is not my purpose to say, that in no case can the Legislature rightfully pass a retroactive law; nor do I find it necessary to advert to the distinctions which obtain upon this subject, further than to refer to the rule as settled by this Court in *Wilder vs. Lumpkin*. In that case we hold, that "a legislative exposition of a doubtful law is the exercise of a judicial power, and if it interferes with no vested rights, impairs the obligation of no contract, and is not in conflict with the primary principles of our social compact, it is in itself harmless, and may be admitted to retroactive efficiency; but if rights have grown up under even a law of somewhat ambiguous meaning, then the universal rule of our system—indeed of the English system of government, and of other systems which approximate to free government—applies. That rule is, the Courts declare what the *law* is, the Legislature declares what the law *shall be*." 4 Geo. R. 212. The Act of 1806 is a contract between the grantee, Hill, and the Legislature; both parties are bound by its stipulations; what its meaning is, is for the Courts to determine. The grantee proceeds to invest under it according to his understanding of its provisions. He does so at the peril of a different construction by the Courts; they can only act where a case is made. But he is not subject to the peril of legislative constructions; if he were, then charters and grants would be but a mockery. Who would accept a charter if it was subject at all times to legislative construction; that is to say, subject to be impaired by law? No sane man, or half-witted set of men. The power to sit in judgment upon his own contracts by one of the parties, is no where conceded under any system of free government; that would be an enormity at which justice revolts. The Legislature cannot impair the obligation of its own contracts. In our construction, therefore, of the Act of 1806, we lay out of view altogether the declaratory Act of 1841.

[2.] The argument, which it is admitted outside of the courthouse, is very strong in favor of the construction of the 5th section of the Act of 1806, claimed by the plaintiffs in error, is

drawn from the topography of the river and its banks between Hill's Bridge and Fort Argyle. It was stated in the argument, that the Great Ogeechee River, in passing from Fort Argyle to Hill's Bridge, instead of running in a direct course, makes a considerable curve, and that the distance between these two points, in a direct line, is less than five miles, whilst the distance, if measured on the stream, is about ten miles. It was farther stated, that for several miles above Hill's Bridge—perhaps as much as five miles—the river is impracticable for bridge or ferry, in consequence of impassable swamps on its southern bank. From these facts, it is argued that Hill required no protection from competition within five miles measured on the stream; nature protected him within that distance, and therefore he asked for none. The argument goes farther, and assumes that the topography of the country being known to the Legislature, it is presumed that they acted in reference to it, and therefore when they gave Hill an exclusive right within five miles, they meant to say within five miles measured in a right line. Now, all these things may be true, and, if true, make a strong equitable case for the complainant. But can we assume that the *Legislature* acted, in the grant to Hill, with reference to the peculiar condition of this stream? with reference to its meanderings or its marshes? Whilst the fact may be as stated, that the course of this stream is not direct, and that its southern bank is lined with an impassable morass, yet it is not apparent to us, and cannot be made so, that these things were present to the mind of the Legislature, and that they passed the Act of 1806 with reference to them. It is true that Courts, in construing a Statute, will sometimes, in order to ascertain the mischief which it proposes to remedy, consider the circumstances which gave rise to it. Perhaps it was competent in this case for the Court below, in its construction of this Act, to have received evidence to inform its mind as to these facts, and thus derive aid in arriving at the intention of the Legislature. There is no evidence on the record that it did, and no such evidence, as to the topography, comes to us for our aid, if indeed the consideration of it, which I do not assert, would be, in this case, legitimate. In interpreting the Act, we therefore ex-

clude the peculiarities of this stream, which I have stated to have been recognized in the argument. If the protection sought by Mr. Hill had reference to them, he is unfortunate in this, that the Legislature has failed to speak in such a way as to enable us to determine his rights in accordance with what he desired and expected. If it had not such reference, then Mr. Hill was unfortunate in not asking the prohibition for a greater distance. Whilst upon this subject, it is obvious to remark, that if the Legislature, acting with reference to the topography of the place, had intended the measurement of the distance to be in a right line, they would have expressed themselves to that effect in the Act. They have not so expressed themselves, and hence is derived an argument against the conclusion that they intended this mode of measurement. We are left, then, to construe this Act according to the well established and usual rules of interpretation.

In doing so, the object with the Court is to ascertain the intention of the Legislature. The inquiry is, what did the Legislature mean when it declared that it shall not be lawful for any person or persons, at any time or times, to build any bridge or keep any ferry on the River Great Ogeechee, either above or below the bridge of the complainant? The meaning of the Legislature is to be ascertained from the words of the particular clause under consideration, taken together with the whole Act. If, from these, the meaning is clear, no other rule of construction need be resorted to, unless the meaning be also absurd; for no construction can be given to a Statute against its plain and obvious meaning. If the Court can do that, it has the power of legislation. But if the meaning be doubtful, if the Statute is ambiguous, then resort may be had to the subject matter. In remedial Statutes, the old law, the mischief and the remedy are to be considered. This is not a remedial Statute. I cannot perceive that other parts of this Act shed any light upon this section. We resort then to the words used by the Legislature in this section, and to the subject matter of the Act. To the subject matter, because the words do admit of more than one construction, although we think the one we have adopted is fairly drawn from them, and is most reasonable. The words of

a Statute are to be taken in their ordinary and familiar signification and import. If the Legislature had said it shall not be lawful to build any bridge or keep any ferry *within five miles of Hill's Bridge*, and no more, it would have been clear that the distance was intended to be measured in a right line, and that any bridge or any ferry upon any stream or ravine within five miles, so measured, would be prohibited. But it has not said this, and no more. Or if it had said it shall not be lawful to build any bridge or keep any ferry *on the Great Ogeechee River*, within five miles of Hill's Bridge, such a meaning would be perhaps the fairest. But, although they have said this, they have also said more; they have said that it shall not be lawful to build any bridge or keep any ferry *on the Great Ogeechee River*, within five miles, either above or below Hill's Bridge. Now, the object of this language is to give to the grantee protection against competition within five miles. The competition guarded against is from any bridge or ferry *on the river*, to be kept or built within five miles *above or below* Hill's Bridge. Collectively, the several phrases in this clause—in the apprehension of a plain man, and taken in their ordinary and familiar signification and import—would convey the idea that the Legislature, where it speaks of distance in the use of the words, *within five miles*, meant distance on the stream above or below Hill's Bridge. The words, *within five miles*, the common mind would understand to be qualified by the words, *on the Great Ogeechee River* and *above or below*. The subject matter of this clause is in aid of such an understanding. What is that? It is a monopoly to Hill of the bridge and toll privilege on the Great Ogeechee River. That monopoly it was the purpose of the Legislature to grant, and when it undertakes to define the limits within which it shall be bounded, it must be considered as using words in reference to the subject matter—that is, in reference to this bridge and toll privilege, not generally, but on this particular river. The inference is, that these words of distance refer to the stream. Having first spoken of a bridge or ferry *on the river*, the natural meaning of *above and below*, would seem to be above and below in the course of that river; otherwise, the meaning of those

words is indefinite. If *above and below* be not on the line of the river, where is *above*, and where *below*? The ordinary meaning of these words, used in such connection, is not that of *location*—it cannot be here, because, in other words, in this section the location of the prohibited bridge and ferry is fixed—but of *course or direction*. To my mind, they afford a satisfactory construction to the meaning of the Legislature. The construction which the plaintiffs contend for involves them in a very serious dilemma. They argue that any bridge at any point on the stream, within five miles of Hill's Bridge, measured in a right line, is prohibited. By this reasoning, a bridge at Fort Argyle is prohibited but a bridge within the curve of the stream below Fort Argyle and not within five miles of Hill's Bridge, is not prohibited. Suppose this last named bridge were built, what good protection at Fort Argyle do them? This proves that their own construction is not equal to the necessities of their case. The only construction which would afford them entire protection would be, that any bridge or ferry on the stream, on a line perpendicular to its general course, and which line runs within five miles above or below Hill's Bridge, is prohibited. But the law will not admit this construction, and the plaintiffs must be content with such as it does admit. Suppose that, in truth, the Ogeechee River, instead of curving, ran with only slight deviations from a direct course, and there were no impassable swamps on its bank, would there then be any doubt about the construction of this Act? I think not. This proves that the doubt does not so much grow out of the Act itself, as out of the topography of the place. I do not consider that the subject-matter of the Act aids the plaintiff's view of the 5th section. The subject-matter of the whole Act may be stated to be the bridge-toll privilege to Hill, and the public benefit which would result from the erection of a convenient bridge by him. The action of the Legislature, in granting the exclusive privilege to Hill within five miles, was clearly, by prohibiting other bridge and ferries within that distance, to constrain the travel approaching the river on both sides to cross at his bridge. Our construction, if it is true, reduces the privilege of the plaintiffs below what

by their construction. But what then? We do not annul the Act—we give effect to it. We do not thwart the intent and object of the Act. The travel is still restrained from crossing this river at any point within the prohibited distance. We declare, as we understand it, the mind of the Legislature as to the extent that they intended to place constraint upon the travelling public, for the benefit of Mr. Hill. He has his bond. If he failed to ask, or asking, the Legislature failed to give him sufficient protection, I repeat, it is his fault or his misfortune. In considering the words of this Act, *usage* is to be regarded, for the *jus et norma loquendi* is governed by usage. *Smith's Commentaries*, §513. 4 *Reps.* 47. According to usage, when we speak of distance from one place to another, we are understood to mean distance measured on the usual line of travel, that is, on the line of the road between the places. If we speak of distance from the earth to a fixed star, (to use the illustration of his honor below,) we are understood to mean distance measured in a right line, because that understanding is according to the use of such words among astronomers. So, when we speak of a bridge on a stream within five miles either above or below another bridge, I think we would be understood, according to the common use of such phraseology, to mean within five miles on the stream.

[3.] There is one other rule of construction applicable to this case. It is this: grants of exclusive privileges to a corporation, or an individual, are to be strictly construed. The grantee takes nothing by implication, and the rule has been settled to extend thus far, to wit: that any ambiguity in the terms of a contract between an individual or corporation and the public, in which exclusive privileges are granted, must operate in favor of the public and against the individual or the corporation. This rule has been settled in this Court. 1 *Kelly*, 533. 3 *Kelly*, 41. Settled in England to the full extent that I have stated it. In the case of the *Proprietors of the Stone Bridge Canal Company vs. Wheely et al.* the Court say, “the canal having been made under an Act of Parliament, the rights of the plaintiffs are entirely derived from that Act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of

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which are expressed in the Statute, and the rule of construction, in all such cases, is fully established to be this: that any ambiguity, in the terms of the contract, must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them in the Act." 2 *Barn. & Adol.* 793. 11 *Peters*, 544 '5. '6. 6 *Ibid*, 728. 3 *Ibid*, 289. 4 *Ibid*, 168 and 514. 2 *Cow.* 420. 2 *Mass.* 146. *Eng. C. L. R.* vol. 40, pp. 298 to 319. 42 *Ibid*, 496. 2 *Scott N. R.* 228, per Coleman, J. *Ibid*, 226. 11 *East*, 685. S. C. 3 *Scott N. R.* 803, per Maul, J. 6 *Ibid*, 831. 1 *My. & K.* 165. 4 *M. & W.* 482. *Smith's Com.* §504.

The grant to Hill of the privilege of building a bridge over the Ogeechee River, with a right to charge toll, is not, I admit, a monopoly, because, to erect a bridge and charge toll is not a common right which belongs to all the citizens of the State. It is a right which can only be enjoyed under a grant from the Legislature. But when this right is granted, and with it is coupled an exclusive privilege within a prescribed distance, it becomes in the nature of a monopoly. For so long as it is exercised in accordance with the charter, the Legislature cannot revoke it; and the right of the citizen, common to all to ask for and receive such a grant from the Legislature, is precluded. Not only so, but the prohibition against other bridges within the prescribed distance operates as a restraint upon the right of the citizen, which is common to all, to pass the stream, in pursuit of business or pleasure, at any point most convenient to him. The exclusive privilege is in derogation of this common right, and the Act which confers it must be strictly construed. It may be admitted that, in the case before us, the derogation from this common right would be but to a very limited extent. Admitting the construction of the plaintiffs, the inconvenience which would result to the public would be small; perhaps, too, it would be fully compensated by the advantages of the complainant's bridge. Still, the principle upon which the strict construction rule is founded applies. To see the operation of the plaintiffs' construction, suppose that the Tennessee River, which, rising in Virginia, runs southwestwardly across the State of Tennessee, and,

after making a prodigious curve, turns its course northward, and again crosses that State, was altogether within the jurisdiction of Tennessee, and the Legislature of that State should grant to a citizen the right to erect a bridge over it at the commencement of the curve on the east, with a prohibition, precisely as in this case, against bridges or ferries within a prescribed distance above or below it; and suppose that the prescribed distance should embrace the nearest point of the curve on the west, a bridge or ferry there, by the plaintiffs' construction, would be prohibited. What, in that event, would not be the inconvenience to the people of Tennessee living in the region of this western point, and within and outside of the great bend of the stream? In that case, what rule of measurement would apply? What would be considered the intention of the Legislature of that State? The public would be largely interested in the charter to the citizen, and the necessity of a construction favorable to the public, where the terms of the contract are doubtful, would be apparent. The case in this record is the case supposed upon a diminutive scale.

Let the judgment be affirmed.

No. 46.—ALEXANDER W. WYLLY *et al.* plaintiffs in error, *vs.* S. Z. COLLINS & Co. defendants in error.

[1.] Trust estates are liable to pay out of their income for goods or services furnished or rendered, and such as are necessary and proper.

[2.] A creditor is not bound to ascertain whether the trustee is or is not in arrears to the trust estate.

[3.] The rule in South Carolina, which denies relief to creditors, where the executor or other trustee is in arrears to the trust estate, ought not to be adopted in this State, where no returns are made by trustees, other than executors, administrators and guardians, of their receipts and disbursements.

[4.] Future income may be applied to past indebtedness.

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- [5.] A wife and children, who have separate property settled upon them, are not bound to support the husband and father: though, owing to his insolvency, they may be bound to support themselves.
- [6.] A married woman is a *feme sole*, as to her separate estate, unless controlled by the settlement; and if so restricted, she is a *feme sole sub modo only*, and the mode of disposition prescribed in the instrument must be followed.
- [7.] The doctrine of the *Bible* and of the *Common Law*, that husband and wife are *one*, superseded by the introduction of a new principle from the *Civil Law*, that they are distinct persons, with distinct property, and distinct powers over it.
- [8.] The registry of the deed of settlement, accompanied by the management of the trust property by the husband, is, as to third persons, evidence of his agency for the trust property.
- [9.] Although the husband, as such, has no right to control the separate estate of his wife, yet, he may, like any other person, do a ministerial act, such as purchasing goods for the trust estate.
- [10.] Taking the note of the manager of the trust estate, in settlement of the account for goods debited to the manager, individually, but which went to the use of the *cestui que trusts*, does not relieve the trust estate from liability to pay out of its income, where it does not appear that exclusive credit was given to the agent.
- [11.] One simple contract does not merge or extinguish another.
- ✓ [12.] A bill, acceptance or promissory note, either of the debtor or a third person, is not a payment or extinguishment of a debt, unless accepted as such.
- ✓ [13.] The circumstance of the note or bill being given by an agent of the principal debtor, cannot vary the question.
- [14.] If the written promise of the principal debtor does not discharge the debt—a *fortiori*—the note of the agent can have no higher efficacy.
- [15.] Although the Statute of Limitations applies to constructive trusts, yet it is not available where the legal remedy against the agent has not been barred. The Statute does not begin to run in favor of the trust estate, until a return of *nulla bona* against the agent or his insolvency be legally ascertained. The practice of exhausting the legal remedy against such agent, before proceeding in Equity against the trust estate, is in furtherance of justice.

In Equity, in McIntosh Superior Court, April Term, 1850.
Tried before Judge H. R. JACKSON.

The following statement of facts in this cause was agreed upon by counsel for both parties:

Thomas Spalding, on the first day of January, 1833, executed

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a deed to certain persons, conveying two tracts of land and seventy negroes, to be held in trust "for the sole and separate use and benefit of his daughter, Elizabeth Wylly, during her life, and after her death," to her children. The deed alleged, that it was made for the purpose of providing for the maintenance of Mrs. W. and the education of her children. The trustees were authorized to give the management of the property to whomsoever, in their discretion, they thought best qualified. The deed was recorded in the County of McIntosh, (where all the parties thereto, the grantor, *cestui que trusts*, trustees and the complainants below then resided, and still reside.) William Cook and Charles Spalding, two of the trustees, accepted the trust, but never made any appointment of a manager, nor authorized any one to contract debts upon its authority. The trustees never intermeddled with the trust property—the same having been delivered by the grantor to the said *cestui que trusts*. Alexander W. Wylly, the husband and father, planted the land with the trust slaves, sold the crops, and received all the rents, issues and profits of said trust estate and the proceeds of the crops, from the time the deed was made until this suit was brought. Wylly contracted a debt with defendants in error (complainants below) for various articles, furnished in 1840 and 1841, charged in an exhibit to the bill. The account was charged on the books of complainants to Wylly individually—he not professing to act as agent or manager of the trust estate. (The articles sold were used by Wylly and his family, (the *cestui que trusts*,) and partly by the trust slaves, and for the use of the plantation.) Wylly promised complainants to pay for these articles out of the crops which he should thereafter make. On 21st January, 1841, Wylly gave to complainants his individual negotiable note in settlement of said account, and complainant gave him a receipt for the account; upon which note, judgment has been recovered against him, individually, at December Term, 1842, and a *fi. fa.* issued and returned, with an entry of ~~judgment~~ *judgment*. In May, 1844, Wylly sold complainants a carriage for \$165, most of which was to be credited on this debt. No notice was given to the trustees of this debt, or of the intention of

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looking to the trust estate, until complainants filed a bill in October, 1848, seeking to subject the trust property. It was agreed that there were various other suits pending, of the same character, against the trustees; also, that Wylly was utterly insolvent.

The Jury found a special verdict, finding the above facts, and submitting the questions of law arising therefrom to the Court.

After argument heard, the Court held, that the complainants were entitled to recover, upon the facts found. To this decision error has been assigned in this—

1st. That His Honor erred in deciding that the trust estate had never, under the circumstances of the case, been liable to the demands of complainants.

2d. That His Honor erred in deciding that the complainants had not discharged the trust estate by debiting Alexander Wylly, individually, and by subsequently taking his individual note, giving a receipt in settlement, and suing upon said note.

3d. That he erred in deciding that the claim was not barred by the Statute of Limitations.

LAW and CHARLTON, for plaintiffs in error.

Points made by plaintiffs in error—

1. The trust estate sought to be charged, was never, under the circumstances of the case, liable to complainants, the defendants in error.

The credit was given to A. W. Wylly exclusively—he alone was to be liable—all the facts of the case shew this. Even if he had been trustee, he could not bind the trust estate. *Story on Agency* §280. *Story on Notes*, §63. 1 *Bailey's Equity*, 159 to 162.

In Equity, an exception prevails—but three things must combine to create this equitable exception. 1. The necessity of the debt to the trust estate. 2. The indebtedness of the trust estate to the trustee. 3. The insolvency of the trustee. Where they combine, the creditor is subrogated to the rights of the trust. *Bailey's Eq.* 162 to 164. *Ibid*, 290. *Ibid*, 317, 318. 1 *Richardson's Eq.* 233, '4. 2 *Strobhart's Eq. Rep.* 235, '6. See, also

1 *Hill's Ch. Rep.* 228, 231, 232, 233, 235, '6, 240, as to right of husband to bind.

2. If the trust estate was ever liable to defendants in error, it has been discharged by the acts of said defendants in error. They have made their election, by debiting A. W. Wylly, individually, by taking his note, and by suing him, and by their other acts. They are bound by such election. *Story on Agency*, §§279, 288, 291. 17 *Eng. Com. Law Rep.* 337. 15 *East.* 62. 14 *Connecticut Rep.* 502, 8. 10 *Wendell*, 271. 1 *Bailey*, 289.

3. The Statute of Limitations, or the equitable principle analogous thereto, has barred this claim against the trust estate. *Angel on Limitations*, pp. 229, 291, 293. 12 *Wheaton's Rep.* 565. 10 *Peters' Rep.* 223. 2 *Story's Eq. Jur.* §1520. 1 *Sch. & Lef.* 413, 429. 1 *Ball & Beat.* 156, 166. 6 *John. Chan. Rep.* 291, '2. 6 *Geo. Rep.* 21. 8 *Geo. Rep.* 108.

HARDEN & LAWTON and HENRY & WARD, for defendants in error, presented the following propositions on behalf of defendants in error :

1st. That trust estates are ordinarily liable for goods, services, and supplies furnished them, or which go to their use. 4 *Dess.* 19, 591. 1 *McCord's Ch. Rep.* 267. 2 *McCord's Ch. Rep.* 105. *R. M. Charlton's Rep.* 376. 3 *Kelly*, 383. 2 *Story's Eq. Jur.* §1400.

2d. That taking the note of Wylly, (with a receipt given, as in this case, calling it a *settlement*,) did not relieve the trust estate from liability. *Story on Promissory Notes*, §§104, 105, 117, 404, 438. 5 *Johns.* 68. 8 *Johns.* 389. 7 *Hill*, 128. 2 *Richardson*, 241. 6 *Ga. Rep.* 171. *Webster's Dict.* (word *settle*.) 2 *Bouvier's Law Dict.* 394. 1 *Kelly*, 287, 288. 3 *Kelly*, 397. 4 *Dess.* 19, 591.

3d. That Mrs. Wylly, the *cestui que trust* for life, had the power and the right to incumber the profits of the trust estate, and to do this through her husband. 1 *Kelly*, 389. 6 *Ga. Rep.* 20. *Story on Agency*, 7, 8.

4th. That the receipt and use of the goods raised a consid-

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eration for an implied promise by Mrs. Wylly or her trustees, to pay for the goods out of the trust estate, inasmuch as such a promise would have been implied, at law, had she been *sui juris*, so as to bind her personally. 14 *Johns.* 188. 10 *Johns.* 244, and cases cited, with Equity cases referred to above.

5th. That if Wylly was not the agent of the trust estate, with power to bind it, then, on his furnishing it with necessaries, the estate became his debtor, and he being insolvent, and being the debtor of the defendants in error, and having promised to pay them out of the income of the trust estate, they should stand in his place and be subrogated to his rights, especially as he was not bound, under the circumstances of the case, to support his wife and children. 2 *Kent's Com.* 190, 191: 9 *Vesey*, 286. 14 *Vesey*, 499. 4 *Johns. Ch. Rep.* 100, 104, 105. 2 *Barb. Ch. Rep.* 375. 1 *Maddock's Rep.* 59. *Bailey's Eq. Rep.* 311. 1 *Hill's Ch. Rep.* 234.

6th. That the record shows that Wylly was a *general* agent, and that exclusive credit was not given to him individually, as he promised to pay out of the crops to be made with the trust property, and the defendants in error ought to be paid, especially as the trustees did not act. *Story on Agency*, 115 to 118, 451. 14 *Vesey*, 501.

7th. That defendants in error are entitled to recover, whether Wylly did or did not disclose his agency or make known his principal. *Story on Agency*, 453.

8th. That, under the peculiar circumstances of this case, a Court of Equity might well decree that Wylly was, *quoad hoc*, a trustee himself. 2 *Story's Eq. Jur.* §1059. *Willis on Trustees*, 32, 33, 70.

9th. That upon general principles of equity, even if it be clear that Wylly mismanaged the estate, still defendants in error are not responsible for such mismanagement, and if loss is to ensue to either party, they should not suffer for having given credit to an estate on the promise of a manager, held out to the world as such manager, by constructive notice from the registry and actual appointment by the grantor. But that the record dis-

closes no mismanagement—at least no waste of the income by Wylly.

10th. That neither the Statute of Limitations, nor the rules of Courts of Equity in analogy thereto, or for the discouragement of *laches* and stale demands, have any application to this case:

First. Because, taking the whole joint answer of all the defendants together, a debt of some sort is admitted, on the record, to be due, and the Statute is avoided, as to that debt, by the admission itself. 20 Johns. Reps. 576.

Secondly. Courts of Equity act in obedience to the Statute only when they have concurrent jurisdiction with the Courts of Law and the legal remedy has run out. 2 Story's Eq. Jur. §1520. Kane vs. Bloodgood, 7 Johns. Ch. 114 to 118. 7 Ga. Rep. 159, 160. 6 Johns. Ch. Rep. 289.

In all other cases, (except, perhaps, in some cases of *direct* trusts,) they act either upon their own rule of *twenty years*, or, according to the circumstances of each case, they discourage *laches* within or beyond twenty years, that being the longest period within which they usually give relief. 2 Scho. & Lef. 607, 630, 631, 632. 15 Peters, 272. 1 Howard, 189. 2 Barbour, 595. 2 Story's Eq. Jur. §1520, and note 3.

Thirdly. The case at bar is one of *exclusive Equity jurisdiction*.

Fourthly. The case under consideration is not only that of a trust cognizable in Equity, but it is ~~the~~ case of a *direct trust*. If it is the case of a trust at all, the Statute of Limitations has no application to it, unless there is a concurrent jurisdiction at law. 7 Johns. Ch. Rep. 124 to 128. 20 Johns. 583 '4. 7 Ga. Rep. 160, 161.

Fifthly. The defendants in error have not been guilty of *laches* in the prosecution of their equitable demand.

By the Court.—LUMPKIN, J. delivering the opinion.

A bill was filed in the Superior Court of McIntosh County, by S. Z. Collins & Co. against Alexander W. Wylly and Elizabeth, his wife, William Cook and Charles Spalding, trustees, for the purpose of subjecting the income of the trust estate of Mrs. Eliza-

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both Wylly to the payment of a debt due the complainants for articles furnished to the trust estate, and to the *cestui que trusts*.

By the deed which gave existence to this estate, the grantor, Mr. Thomas Spalding, declared that his sole purpose in conveying the land and negroes, mentioned in the instrument, was for the maintenance of his daughter, Mrs. Wylly, and for the education of her children; the whole property to be for the sole and separate use of his daughter during her life, and after her *death*, then for the benefit of such child or children as might be living at the time of her decease. He gave to the trustees the right to appoint an agent to manage the property. The bill charges, that Alexander W. Wylly was the agent thus appointed. The answer admits that the trustees accepted the trust, but never afterwards interfered with the estate. It denies the appointment of Wylly, but admits that he, together with his family, the *cestui que trusts*, were in possession of the land and negroes from the 1st of January, 1833, when the deed was executed, down to 1848, when the bill was filed; that Wylly planted the land with the trust slaves, sold the crops and received the whole income during this entire period. Wylly contracted this debt with the complainants, who were merchants. The account was debited on the books of the firm to him, individually, and was for articles furnished during the year 1840, which the decree finds were charged at reasonable rates, and were used and consumed by Wylly and his family, and partly by the trust slaves and on the plantation. I would remark here, that the wife and children are not bound to support the husband and father, though, owing to his insolvency, they may be bound to support themselves out of the separate property set apart for that purpose. The Court below offered to the parties to have this point referred, if they thought proper, and to strike from the account all the items which were used by Wylly, he being alone responsible for them.

Wylly promised to pay complainants' debt out of the crops which he should thereafter make. In 1841, he gave his individual negotiable note to the complainants, in settlement of the account, and a receipt was given to him for the same, on settlement. Shortly thereafter, suit was instituted on this note, and a judgment

rendered in December, 1842, for principal, interest and cost. In 1844, the proceeds of a carriage, sold by the defendant to the plaintiffs, was credited on the execution, and, in 1848, a return of *nulla bona* was made on the *fi. fa.* by the Sheriff of McIntosh County.

No notice was given by the creditor to the trustees of the debt, or of their intention to hold the trust estate liable, until the filing of the bill in October, 1848. It is agreed that there are various claims of a similar character outstanding against the trust estate, on some of which proceedings have been instituted. Wylly is insolvent, and availed himself of the benefit of the Honest Debtor's Act before this bill was filed.

The bill alleges, that the trust estate, for whose benefit these goods were supplied, is ample, from the rents, issues and profits, to support the *cestui que trusts*, to educate the children and to pay the debts; and prays that the *surplus* only—after the objects of the donor's bounty are fully provided for—may be set apart for the satisfaction of complainants' demand.

Two questions are made by this record for the consideration of the Court—

1st. What were the original rights of the complainants in the Court below, as against this trust estate, for the goods which they sold and delivered?

2d. If these complainants had any rights against the trust estate, have these rights been lost by any acts of commission or omission on their part?

1. What were the rights of these complainants against this trust estate?

[1.] I take it to be well settled, that a trust estate is liable for articles furnished for its benefit, and which are necessary and proper for its support—due regard being had to the condition and circumstances of the *cestui que trusts*.

This principle has been repeatedly adjudicated in South Carolina. In *Carter vs. Everleigh and Wife*, (4 Dess. Eq. Rep. 19,) the Court of Appeals unanimously held, that where the husband, acting as *manager* of a separate trust estate of his wife, purchased a saw-gin for the use of the trust estate, of which it had the

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benefit, the trust estate was liable to pay for the saw-gin, *although the husband gave his own note for the gin, and the vendor, believing him the owner of the property, had sued the note and pursued the husband to insolvency.* This is a leading case in the Courts of our sister State, and has never been overruled. On the contrary, it was cited as law by Chancellor *Harper*, as late as 1833, in *Magwood & Patterson vs. Johnston and others*, 1 *Hill's Ch. Rep.* 228. It is identical, in every particular, with the case before us.

In *James vs. Magrant*, (4 *Dess. Eq. Rep.* 591,) a factor had furnished supplies to a trust estate, and the Court, conceiving that the trust property had received the benefit, re-affirmed the decision in the foregoing case, and held the trust estate bound to make compensation; and that, too, notwithstanding the *husband*, who was insolvent, *had given his note for the articles.*

Montgomery vs. Everleigh and others, (1 *McCord's Ch. Rep.* 267,) was a bill filed to make the trust estate liable for a quantity of corn, alleged to have been supplied for the subsistence of the slaves of the trust estate. The complainant, who was the indorser of the note of hand given for the corn, had been obliged to pay it, and this proceeding against the trust estate was for re-imbusement. Mrs. Ann Everleigh, the *cestui que trust for life*, had hired out the slaves and plantation by the year, at the time the corn was bought, to her son Thomas. No notice of that fact, however, had been given to the world, or that he was to be looked to for supplies furnished the trust estate. It was in proof that Thomas Everleigh had no property of his own, and that for a number of years he had acted as the general agent of his mother, and transacted all the business in relation to the trust estate.

Chancellor *Dessaussure*, under the circumstances, did not hesitate to hold the trust estate liable for the debt. He said it would be a fraud upon the public to protect a trust estate from such a demand. He referred to the cases of *Carter and Everleigh* and *James and Magrant*, where it had been settled that trust estates were responsible for debts contracted for their use, and remarked that it would be destructive to trust estates if they were not so liable, as it would take away all credit when the slaves

might be perishing for want of food, or dying for want of medical aid.

Douglas vs. The Executor of Fraser, (2 *McCord's Ch. Rep.* 105,) was that of a debt partly owing by the testator in his lifetime, and in part contracted by the executor for goods, &c. for which the executor had given his own note. The executor was insolvent, and the bill was filed against him to subject the estate in his hands to the payment of the debt. The Chancellor ruled, that the estate was liable, and, upon appeal, the decree was affirmed—Judge *Nott* observing that the mere circumstance of the executor having liquidated the demand, could not exempt the estate from the payment of a debt otherwise chargeable upon it.

In 1832, Dr. Habersham filed his bill against the estate of Gen. *Jacob Read*, to recover for medical services performed for negroes belonging to the estate of Gen. Read, on the faith of the estate, and at the instance of the executor thereof, who had since died insolvent. Our learned brother, Law—now of counsel for the plaintiffs in error—the boast of the bar—who then presided on the bench of the Eastern Circuit, with such distinguished honor to himself and usefulness to his country, leaving on record the deeply engraven impressions of a genius which still burns with a pure and bright flame, throwing far and wide its beneficent beams, to guide and cheer us—examined this doctrine, particularly in reference to this description of trust property, consisting in plantation and negroes, and requiring, as necessary to their utility, and even existence, supplies of utensils, food, clothing and medical attendance, and came to the conclusion that, upon principle, as well as the authority of adjudicated cases, these Carolina decisions, which he cites with approbation, are perfectly just and equitable, and in accordance with sound policy. *R. M. Charlton's Rep.* 376.

[2.] While the general rule, established by these precedents seems to be admitted, it is contended that usually the creditor of a trustee has no right to resort to the trust estate for the payment of his debt, and that a creditor thus dealing has no right to look to the trust estate for remuneration, unless the trustee, if he has paid the debt out of his own funds, would be in advance to the

trust estate, and would be entitled to be re-imbursed out of it in that event, it is admitted that the creditor may, if the trustee is insolvent, be allowed to take his place, and be paid out of the estate to the same extent; that the income of the estate is the fund for current expenses, and that the money in the hands of the trustee is that to which the creditor must look for payment. But before he can make the trust estate liable, he must show—

First. The necessity of the debt for the trust estate.

Secondly. That the trustee has no funds of the estate in his hands, or, as it is otherwise sometimes stated, the indebtedness of the trust estate to the trustee; and,

Thirdly. The trustee's insolvency. And, in support of this proposition, we are referred to *Guerry vs. Capers*, 1 *Bailey's Eq. Rep.* 159. *Manigault vs. Deas*, *Ibid*, 283. *Henshaw vs. Freer* *Ibid*, 311. 3 *Dess. Eq. Rep.* 417, 418. 2 *Strobhart's Eq. Rep.* 235, 236. 2 *McCord's Ch. Rep.* 58.

I have endeavored to analyze these cases carefully. Some of them do not touch the main question involved in this discussion namely: whether the *income* of the trust estate may not be bound for debts contracted for its benefit? and none of them deny directly the affirmative of this proposition.

But a new principle is attempted to be engrafted on this ancient doctrine; and that is, that where an executor or other trustee has received funds of the estate sufficient to pay the debt, and has failed to apply them to the purposes of the trust, or is indebted to the estate, that the creditor cannot go upon the estate for payment.

[3.] But it will be observed that these were all cases of *executors*, who are compelled to make annual returns, and whose accounts are open to public inspection. In this State, trustees—other than executors, administrators and guardians—have not been required to make returns of their actings and doings. It is impossible, therefore, for creditors, in the exercise of any degree of diligence, to ascertain the condition of the trust estate or to know whether the disbursements have been made prudently or extravagantly, or whether the current expenses exceed

the current income or not. This constitutes a striking difference between the two classes of trustees.

But if this modern principle is to be understood as maintaining that, where the trustee, in this class of trusts, is in arrears to the trust estate, the creditor who has furnished articles for the use and benefit of the trust estate, and which are necessary and proper for it, is not entitled to payment, unless the trust estate is in debt to the trustee, so that the creditor may be subrogated to his rights—equity making that party responsible, at once, on whom the burden must ultimately fall, we are compelled to withhold from it our assent. We cannot subscribe to the proposition, that the equity of the creditor depends upon the **fact** of whether or not the trustee be in advance or in default to the trust estate. It rests, we suppose, upon an entirely different principle. Humanity to trust estates—the necessity of the case—forbid, in our judgment, the establishment of such a principle.

The trustee may be delinquent for thousands for past mismanagement; that, however, cannot deprive the trust estate of things necessary and proper for present subsistence. And suppose my agent has received and squandered my effects, are third persons to suffer on that account? It may constitute a very good reason why he should be removed, and a more faithful steward substituted in his place, but it cannot justify the withholding payment from the creditor who has fed and clothed me, and administered to my wants. It is a sufficient safeguard, that the *income* only of the trust estate can be charged, and that, too, for things *necessary* and *proper*. Here the *excess* only of the income, after the purposes of the trust have been fulfilled, is sought to be subjected. A decree more kind and considerate, for the protection of the trust estate, could not have been rendered. With such a check as this, there are few who would be willing to extend credit to trust estates. The careful and prudent man of business would be reluctant to run such a risk—much less involve himself in the onerous and ungracious task of sifting thoroughly the state of the accounts between the trustee and *certain que trust* before he can venture to give credit. All this would be troublesome enough where annual returns are

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made. In the absence of such means of information, I am at a loss to conjecture how such an examination could be possible.

[4.] But if I do not misapprehend the argument, it goes further still, and maintains that the trustee should *pay* as he *receives*. This position we believe to be wholly untenable. It is contended that the creditor must look to the income, and that the income cannot be anticipated so as ultimately to encroach upon the principal. But we cannot admit that the creditor is restricted to payment, to the income of the year during which the sums were furnished. Flood and drought—excess of rain or of it—and a thousand casualties might occur to reduce the income of any given year far below their most moderate expectations. In such a case, must the estate suffer, or the creditor compelled to lose his money? And suppose that, under such circumstances, the trustee, instead of economizing, should waste the income by lavishing it on luxuries or superfluities, so that the merchant, mechanic and physician go unpaid, who have contributed their goods, or work and labor, or skill to sustain the *cestui que trust* and trust property?

It is argued that the consequences would be monstrous, if a husband were to be permitted to charge, by his contract, on the separate estate of the wife.

[5.] A husband, if he is able, is bound to maintain his wife and children, notwithstanding they may have separate property, where he lacks the ability. Had Wylly lived, at the time the debt was contracted, apart from his wife, or had the trustee received notice from the wife, interdicting any application to the husband of the trust funds, or had the trustees given to the estate their personal supervision, or employed any other than the husband as manager, the case would have been different. *Aston vs. Aston*, 1 Ves. 267. *Riders vs. Lewis*, 1 Atkyns, 340. *Thrupp vs. Harman*, 3 M. & K. 516. 10 Law Jour. N. S. 4116.

What is there in this deed to prevent Mrs. Wylly from doing as she pleased of the income arising from this property, which was for her sole and separate use during her life? 518. 14 Ves. 552. If, instead of suffering it to accumulate,

preferred to employ it in a more expensive way of living, is there any law or authority to forbid it? And would it not be presumed, even if the fact had not been found, that these disbursements made by the husband were by the direction and consent of the wife. 2 P. Wms. 82. 4 Bro. C. C. 326. 8 Bligh, N. P. 224, 246. S. C. 4 Sim. 588. 2 Cl. & Fin. 665.

[6.] But I will not stop to consider the *status* of a *feme covert* in respect to her separate estate. Whatever may have been the Common Law rule upon this subject, it is now settled, so far as authority can settle any point, that, with respect to her separate property, a married woman is to be regarded, in Equity, as a *feme sole*. And, in many of the cases, the Courts have gone to the extent of holding that, notwithstanding any particular mode of disposition be specifically pointed out in the instrument, yet it does not preclude her from adopting any other mode, unless there are negative words restraining her power to the very mode designated. 4 Barbour, 553. 17 Johns. 548. 22 Wend. 528. 2 Story's Eq. Jur. §§1397 to 1401. 1 Craig & Phil. 48. 7 Paige, 14. Ibid, 112. 10 Paige, 346. 11 Paige, 475.

This Court has not felt at liberty to depart from the doctrine held by Chancellor Kent, in the case of the *Metho. Epis. Church vs. Jaques*, (3 Johns. Ch. Rep. 77,) namely: that a *feme covert*, with respect to her separate property, is to be considered as a *feme sole* to the extent only of the power given to her by the deed of settlement; her power of disposition being not absolute, but *sub modo*, to be exercised according to the mode prescribed in the deed or will under which she becomes entitled to the property.

[7.] By the Common Law and by the Bible, which is the foundation of the Common Law, the union of man and wife was a junction of persons and fortunes—"no more twain, but one flesh." But this link which bound them in one bond, for better and for worse, has been broken, and, in the progress of civilization, a new principle has been introduced from the Roman Law, viewing husband and wife as distinct persons, with distinct property and distinct powers over it. Time will test the propriety of this innovation. 3 Dess. 417.

[8.] But I pass on, remarking that it is not pretended that

Wylly acted in this case in the character of husband merely, but in the capacity of agent for the trustees. By the deed, they were authorized to appoint some fit and proper person to manage the property and make it productive for the objects of the trust. Could any one more suitable have been selected than the husband and father of the *cestui que trusts*? We have endeavored to show, upon general principles of equity, that even if Wylly had mismanaged the estate, the defendants in error are not responsible for it; and that if loss must ensue to one of the parties, that they should not suffer for having given credit to this authorized agent. But the record really discloses no mismanagement, at least no waste of the income by Wylly. His insolvency does not prove it, neither does the fact that there are outstanding debts unpaid and menacing the trust estate. All this may have been the result of misfortune, or of circumstances beyond his control.

[9.] That these creditors had a right to trade and treat with Wylly as agent, we think abundantly shown by the testimony. True, the trustees may not have intended to depute to him express authority; but the question is not what power they designed to give, but what power third persons who dealt with him had a right to infer he possessed? Strangers can only look to the *acts* of the parties, and not to any private understanding that may exist between them; and if a person permit another to assume the apparent right of disposing of property in the ordinary course of business, it must be presumed that the apparent authority is the real authority. (When the principal has been informed of what has been done, he must dissent and give notice of it within a reasonable time, and if he does not, his assent and ratification will be presumed.) *Dunlap's Paley*, 172, note. 2 *Kenl's Comm.* 616. 1 *Liv. Pr. and Ag.* 396. *Benedict vs. Smith*, 10 *Paige*, 127.

Could the authority, assumed and exercised for fifteen years over this trust estate by Wylly, have escaped the notice of the trustees, residing as they did in the same County? Yet they never, during all that time, complained or repudiated his acts. Third persons had a right to infer that they assented to, and would ratify his purchases for the trust estate.

2. This brings us to the consideration of the second question presented for the decision of the Court. If the complainants in the bill had a right to proceed against the trust estate, have their rights been lost by any acts of commission or omission on their part? It is argued, on the other side, that they have been lost, both by acts of commission and omission—

1st. By having given credit to Alexander W. Wylly, and then taking his note for the account.

2d. They are barred by the Statute of Limitations.

We will examine each of these two grounds of defence.

[10.] 1st. Did the fact that the goods were charged to Wylly, and his note taken for the same, discharge the trust estate from all liability?

If an agent buy in his own name, without disclosing his principal, and the seller subsequently discover that the purchase was, in fact, made for another, he may, at his choice, look for payment either to the agent or the principal—and that too, notwithstanding the title has been made to the agent, and he debited with the account—to the agent upon his personal contract—to the principal upon the contract of his agent. On the other hand, if, at the time of the sale, the seller knows not only the person, who is nominally dealing with him, is not principal, but agent, and also knows who the principal really is, and notwithstanding all the knowledge, chooses to make the agent his debtor—dealing with him and him alone—the seller must be taken to have abandoned his recourse against the principal, and cannot afterwards, upon the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. *Nelson vs. Powell*, 3 Dougl. 410, and note by Mr. Roscoe, the editor, *ibid.* *Addison vs. Sandaxqui*, 4 Taunt. 574. *Patterson vs. Sandaxqui*, 15 East. 62. *Thomson vs. Davenport*, 9 B. & C. 78. *Freeman vs. Andrews*, 4 Wash. C. C. Rep. 567.

An election deliberately made, with knowledge of facts and absence of fraud, is conclusive; and the party who has once elected, can claim no right to make a second choice, and there

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is no difference in this respect between the rules pursued by Courts of Law and Equity. *Dunlap's Paley*, 249, note.

Does the evidence in this case establish such an election on the part of the creditor to look alone to Alexander W. Wylly for payment, as to preclude him from going against the trust estate? We have seen that the bare circumstance of having charged the goods to him on his books, does not constitute such an election; neither does the taking of the note *in liquidation* of the account.

[11.] One simple contract does not merge or extinguish another. 11 *Mass. Rep.* 359, 361. A check at two months, given for goods sold, was held to be no payment—it never having been accepted. 1 *Esp. Rep.* 5. 2 *Bos. & Pull.* 518, 524. A promissory note no bar to an action upon a simple contract. 1 *Burr.* 9. 1 *Bla. Rep.* 65. Unless the defendant agreed to take the note in payment and run the risk, it is no payment. 7 *T. Rep.* 64, 66. Ch. Justice *Marshall*, in *Shehe vs. Mandeville*, said, it is not denied that a note, without a special contract, would not, of itself, discharge the original cause of action—it is otherwise by the agreement of the parties. 6 *Cranch*, 253, 264.

[12.] Indeed, the general rule is now well settled, that a note, bill, acceptance or promissory note, either of the debtor or of a third person, is no payment or extinguishment of the original demand, unless it is expressly agreed to receive it as payment. *Porter vs. Talcott*, 1 *Cowen*, 359, 383. *Harris vs. Johnston*, 3 *Cranch*, 318. *Tobey vs. Barber*, 5 *Johns. Rep.* 68. *Schemerhorn vs. Lonies*, 7 *Johns. Rep.* 311. *Johnson vs. Weed*, 9 *Johns. Rep.* 309. *Muldon vs. Whitlock*, 1 *Cowen*, 290. *Porter vs. Talcott*, *Ibid.* 359. *Whitbeck vs. Van Ness*, 11 *Johns. Rep.* 409. *Carlies vs. Cummins*, 6 *Cowen*, 181. *Van Ostrand vs. Reed*, 1 *Wend.* 424. *Watrous, ex'r, vs. McLaren*, 19 *Wend.* 567. *Brown vs. Jackson*, 1 *Wash. C. C. Rep.* 516. *Parker vs. The United States*, *Peters' C. C. Rep.* 462. *The United States vs. Lyman*, 1 *Mason*, 482. *Hays vs. Stone*, 7 *Hill*, 128. *Hughs vs. Wheeler*, 8 *Cowen*, 77. *Frisbie vs. Larnea*, 21 *Wend.* 450. *Cole vs. Sackett*, 1 *Hill*, 516. *James vs. Williams*, 13 *Mees. & Wels.* 828.

[13.] The circumstance, that the note or bill was given by the agent of the principal debtor, cannot vary the question. 1 *Liv.*

Pr. and Ag. 207. *Dunlap's Paley*, 247, note 3. If the vendor, on a sale made to an agent, take the promissory note of the agent for the amount of the purchase, on failure of payment by the agent, the principal would be equally liable to an action by the vendor, founded upon the original consideration, as if the note had been given by the principal himself. *Ibid.*

[14.] If neither the written promise of the debtor nor the promissory note of a third person be deemed payment, so as to extinguish the debt, and confine the creditor to his remedy under the written instrument, unless accepted as such at the time of the sale—a *fortiori*—the note of the agent can have no higher efficacy to discharge the principal, than if made by the principal himself. *Ibid.* See, also, authorities cited on the main proposition. (In the absence of all proof, then, as to whether or not the complainants intended to exonerate the defendants, the presumption would be that they did not.) To screen the trust estate, it should have been shown that Wylly's note was taken as payment, and that the creditor agreed to run the risk of its collection.

But so far from having elected to look alone to the agent, there is some evidence directly the other way. I do not refer to the notorious insolvency of Wylly, but to the promise which he made, that he would pay for the articles bought out of the crops made by the trust property. The credit was given to Wylly, it would seem, on the pledge and faith of the trust estate. But the election of the agent must be to the exclusion of the principal, or the doctrine, on which this portion of the argument rests, does not apply. The creditor, as he should have done—I do not say he was bound to do it—has looked, in the first instance, to Wylly, and, having prosecuted him to insolvency, he now comes into Equity and seeks to make the principal liable to the extent merely of subjecting the surplus income, after defraying the necessary expenses of the family, to the payment of his debt. Is not this reasonable? Is it not right? If the debt be honest, and the debtor able, of his abundance, and without defeating the ulterior objects of the trust, to pay, should Chancery not compel it? Suppose the income of past years was wasted, is that

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any answer why the income of future years should not be thus applied? (Where one of two innocent persons must suffer by the misconduct of a third, that party should suffer, who, by his own acts and conduct, has enabled such third person, by giving him credit, to perpetrate a fraud or practise an imposition upon the other party.) And although the principal puts funds in the hands of his agent, yet, if he pay not the creditor, the principal must stand liable. This is the highest equity—the highest morality. *Speering vs. Degrave*, 2 Vern. 643. *Kymar vs. Swoer-cropp*, 1 Campb. 109.

[15.] 2d. The last ground taken by counsel is, that the claim is barred by the Statute of Limitations.

(The claims which are barred in Equity, are only such as the party coming into a Court of Equity had also a right at Common Law.) (The Statute never applies to a purely equitable claim where there is no remedy at Common Law.) In such cases the Courts will not allow the Statute to be avoided by a change of the forum. A claim, for instance, against the trust estate of a married woman, being purely equitable, is never barred by the Statute. 2 Dan. Ch. Pr. 732. 2 P. Wms. 144. 7 Johns. Ch. Rep. 116.

In *Bond vs. Hopkins*, (1 Sch. & Lef. 428,) Lord Redesdale said, "The Statute of Limitations does not apply, in terms, to proceedings in Courts of Equity. It applies to particular actions at Common Law, and limits the time within which they shall be brought, according to the nature of these actions; but it does not say there shall be no recovery in any other mode of proceeding. Nothing is better established in Courts of Equity, than that where a title exists in conscience, though there be none at Law, relief should, though in a different mode, be given in Equity. But it is said that the bar, arising from lapse of time, ought not to be removed. Why not as well as a satisfied term, if used against conscience? But it is contended that the bar, arising from the Statute of Limitations, ought not to be removed, because the enactment of the Statute is positive. The answer is, the positive enactment has nothing to do with the case. The question is, not whether it shall operate in a case, provided for

by the positive enactment of the Statute, but whether it shall operate in a case not provided for by the words of the Act, and to which the Act can only apply, so far as it governs decisions in the Courts of Equity—that is, whether it shall prevent a Court of Equity from doing justice, according to good conscience, where the equitable title is not barred by the lapse of time, although the legal title is so barred.”

In regard to equitable titles, Courts of Equity are to be considered as affected only by analogy to the Statute of Limitations. If the party be guilty of such *laches* in pursuing his equitable title as would bar him—if his title was solely at Law—he shall be barred in Equity; but that is all the operation it has or ought to have in proceedings in Equity. *Per Dunkin, Chancellor, in Smith vs. Smith, 1 McMullan's Eq. Rep. 126.*

Now, the statutory bar in this case had not attached at law, as between the original parties. Wylly gave his note in settlement of the store account in January, 1841. The judgment was obtained against him in December, 1842. A partial payment was made by the defendant in 1844, and a return of “*no property*” was indorsed on the execution in 1848, within less than seven years of the date of the judgment. The Statute of Limitations being admitted in a Court of Equity, by analogy only, and the Common Law right against Wylly never having been lost from the creation of the debt to the filing of the bill, and Wylly being the agent only of the trustees and *cestui que trusts*, would it not be singular to hold, that the creditor had lost his equitable rights against the trust estate? But, to our minds, the most satisfactory answer to be made to the Statute of Limitations is, that it never commenced running against the equitable claim, which the complainants in the Court below had against this trust estate, until their legal remedy against Alexander W. Wylly had been exhausted, and had proved ineffectual for the recovery of their debt.

The course pursued in this case, was that which was followed in all the precedents which have been cited. It is the most advantageous and just to the trust estate. The process of law has been exhausted to obtain redress of the parties primarily liable;

and we are inclined to think that, ordinarily, a Court of Equity should not take cognizance of a cause of this sort, until the right of the creditor, and the insolvency of the debtor, have been first ascertained in this way. Certainly, in all cases, it is the most satisfactory mode, and in some, perhaps, the only way in which these facts could be fully established. 1 *Bailey*, 311.

At any rate, equity will acquit this creditor of being guilty of such *laches* as will deprive him of the relief which he seeks.

We are accordingly of the opinion, that the merits of this case, upon the law, are with the defendants in error. I cannot dismiss it, however, without acknowledging my indebtedness to all the counsel concerned, for the masterly manner in which it has been argued, and my particular obligations to my brother *Ward*, for his model *brief*, which has been of essential service to me in preparing this opinion for publication, after an interval of more than two months since its delivery.

No. 47.—CHARLES F. PRESTON, plaintiff in error, vs. WILLIAM H. CLARK, defendant in error.

[1.] When a judgment has been rendered by a Court having *jurisdiction* of the *subject matter*, and the *party* against whom it was rendered, such judgment is not void, although the Court rendering it may have erred as to the law, there being no appeal therefrom on account of such error in law, or other irregularity in obtaining such judgment.

Assumpsit, &c. in Chatham Superior Court. Tried before Judge H. R. JACKSON, May Term, 1850.

This was a suit by W. H. Clark against C. F. Preston upon a promissory note for \$363 80 To this suit, Preston pleaded a total failure of consideration in this—that the note was given in consideration of the transfer of a judgment in Camden Inferior

Court, against one James W. Preston, which was alleged to be void.

It appeared on the trial, that the judgment transferred was rendered in a suit brought by Clark against John H. Dilworth, as drawer, and James W. Preston, as acceptor of a bill of exchange, to which suit each entered pleas; that a verdict was found against James W. Preston, and a discontinuance entered as to John H. Dilworth, on this verdict. Judgment was entered against Preston.

The defendant below proposed to prove, that on a motion to distribute the proceeds of the sale of the property of James W. Preston, in Chatham Superior Court, the said judgment, after argument heard, was, by the presiding Judge, declared void, and not entitled to any participation in the fund—the present plaintiff, W. H. Clark, not having been a party to that motion.

The evidence was excluded by the Court, and this decision was excepted to by defendant.

The Court charged the Jury, that if the judgment was void, it would not sustain the plea of *total* failure of consideration—the original cause of action passing under the assignment—and that the judgment was *not void*, but valid.

To this decision and charge, defendant below excepted. Other exceptions were filed, but were not considered or decided by the Supreme Court.

BARTOW and WILLIAMS, for plaintiff in error.

HARDEN and LAWTON, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The main question in this cause is, whether the judgment rendered against James W. Preston, in Camden Inferior Court, was a valid or a void judgment at the time the note sued on was executed. If it was a *void* judgment, then there was a total failure of the consideration for which the note was given; but if it was a valid subsisting judgment against James W. Preston,

then the consideration for which the note was given has not failed.

The original suit was instituted by Clark against John H. Dilworth, as the drawer of a bill of exchange, and James W. Preston, as the acceptor, according to the provisions of the Act of 1826. On the trial of the cause, there was a *discontinuance*, as to Dilworth, by the plaintiff, and a verdict was found against Preston, on which judgment was entered. The argument for the plaintiff in error is, that the discontinuance of the suit, as to Dilworth, was also a discontinuance as to Preston—they being sued *jointly* under the Statute; that the entering up of the judgment on the verdict found against J. W. Preston alone, necessarily makes the judgment *void*, and many authorities have been cited to show that the judgment was *irregularly* rendered by the Court. Whether we should have felt it to have been our duty to have reversed that judgment for *irregularity*, had it been before us on a writ of error, is not now the question—that judgment was rendered by a Court of competent jurisdiction, having jurisdiction of the party and the subject matter of the suit. In *Bostwick vs. Perkins, Hopkins & White*, this Court held, that where the Court, in which the judgment is rendered, has no jurisdiction either of the person or the subject matter of the suit, then the whole proceeding is void and a nullity; but where the Court has jurisdiction, both of the *person* and the *subject matter* of the suit, although it may err in its opinion of the law, yet, such judgment is conclusive upon the parties to it when there is no appeal. 4 *Georgia Rep.* 49.

The Inferior Court of Camden County had jurisdiction of the subject matter of the suit, and also had jurisdiction of the person of James W. Preston, and notwithstanding that Court may have erred in its judgment as to the law in rendering a judgment against him, after a discontinuance by the plaintiff, as to Dilworth, still there was no appeal from that judgment, and it must be declared a valid judgment against James W. Preston, and, therefore, the consideration for which the note was given has not failed.

Let the judgment of the Court below be affirmed.

No. 48.—BIGGERS MOBLEY *et al.* plaintiffs in error, *vs.* JESSE MOBLEY, administrator, &c. defendant in error.

- [1.] The judgment of this Court in *Carter vs. Anderson*, (4 Geo. R. 516.) reviewed.
- [2.] A judgment rendered by a Court having no jurisdiction over the person and subject matter, is a mere nullity, and may be so held in every Court when it becomes material to the interest of parties to consider it.
- [3.] The judgment of a Court having jurisdiction may be set aside by a decree in Chancery for fraud or accident, or the act of the adverse party, unmixed with negligence or fault in the complainant.
- [4.] The judgment of a Court of competent jurisdiction cannot be attacked collaterally in any other Court for *irregularity*, and, in all Courts, is to be taken and held as a valid judgment, until it is reversed or vacated.
- [5.] The judgment of a Court of competent jurisdiction may be set aside, by the Court which rendered it, for fraud and irregularity.
- [6.] Upon a proceeding instituted before the Court of Ordinary, to reverse a judgment discharging an administrator, it is competent to prove a fraud upon the Court of Ordinary in procuring the judgment of discharge, by proof of representations, upon which the Court acted, by the administrator, that he had fully and faithfully settled the estate and executed his trust, and by proof of acts, on his part, which falsify those representations.

Appeal from Court of Ordinary. Tried before Judge HANSELL, June Term of Appling Superior Court, 1850.

Jesse Mobley, the administrator of the estate of the father of plaintiffs in error, obtained from the Court of Ordinary of Appling County, the following order:

“*March Tr.* 1846. It is ordered by the Court, that Jesse Mobley have leave for letters of dismission from administration on the estate of Bird Mobley, late of said County, deceased. The Court now adjourned till Court in course. 2 March, 1846.”

The plaintiffs in error moved, in the Court of Ordinary, to set aside this order and judgment, on the ground that they were infants at the time the order was granted, and that the same was obtained fraudulently by the administrator, in falsely representing to the Court that he had faithfully and fully administered the estate, when, in truth, he had colluded with one Oscar Edingfield, who brought an action against the administrator, for a fam-

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ly of negroes ; that the administrator, instead of defending the suit, refused to introduce testimony, but fraudulently consented to a verdict, and refused to enter an appeal, by which the estate was damaged to the amount of \$1500 ; and that the administrator had wasted the estate, and been guilty of other fraudulent conduct, of all which they had no notice at the time of the order of dismissal.

The motion was granted in the Court of Ordinary, and Jesse Mobley appealed to the Superior Court.

Upon the trial, the plaintiffs in error proposed to prove that Jesse Mobley had fraudulently given up said slaves to said Edingfield, and had otherwise converted the estate to his use, and that he had imposed upon the Court, in obtaining said letters of dismissal, by falsely representing that he had faithfully discharged the trust.

To all of which the administrator, by counsel, objected on the ground that nothing but *actual fraud* could be given in evidence, and "that fraudulent acts, however flagrant, could not be given in evidence" to set aside the judgment of dismissal, although the plaintiffs were minors, and without guardians.

The Court sustained the objection, and plaintiffs excepted.

Counsel for plaintiffs requested the Court to charge, that as there was no evidence in the records of the Court of Ordinary, that application had been made, and citation issued and published in terms of the law, and as these facts did not appear in the judgment of dismissal, that this was strong presumptive evidence that the pre-requisites of the law had not been complied with ; and further, that the judgment itself was defective and voidable.

The Court declined so to charge, but instructed the Jury, that it was not necessary that these facts should appear of record, or be recited in the judgment of dismissal, and that the judgment was sufficient and valid.

To which charge, and refusal to charge, the plaintiffs in error excepted.

On these exceptions, error has been assigned.

W. B. GAULDEN, for plaintiffs in error.

C. B. COLE, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The decisions of the Court below, assigned for error, I suppose, may have grown out of a misapprehension of the judgment of this Court, in *Carter vs. Anderson*, 4 Geo. R. 516. That was a bill filed by distributees to recover their interest in an estate, the administrator upon which had been discharged by the Court of Ordinary. In that case, we held that the judgment of discharge was a complete bar both at Law and in Equity. We held the judgment conclusive upon parties and privies, but that a Court of Equity would set it aside for fraud; or if the complainants, who were minors, could show good cause against it, of which they were ignorant at the time it was rendered, or of which they were prevented from availing themselves by accident or the act of the administrator; we also held, that the Court of Ordinary, having jurisdiction of the subject matter and the parties, the presumptions were in favor of the regularity of the judgment. What we intended to hold in that case was, that the judgment of the Court of Ordinary, like the judgment of any other Court having jurisdiction, was conclusive until reversed or vacated for irregularity; that it was to be held a valid judgment in all other Courts, and could not be collaterally attacked in other Courts for irregularity, but might be attacked for fraud in Chancery. It was our purpose to hold, and we so declare, that a judgment of discharge, by the Court of Ordinary, is to be held and taken as any other judgment of a Court of competent jurisdiction. We refused to allow the complainants in that bill to open the judgment and recover their distributive shares, there being no sufficient allegations of fraud in it to give jurisdiction to a Court of Chancery. The record before me makes it necessary to re-state the doctrines, generally, as to irregular and void judgments.

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[2.] First, then, I say that a judgment rendered by a Court having no jurisdiction of the parties and subject matter, is a mere nullity, and may be so held in every Court where it becomes material to the rights of parties to consider it. *Rodgers vs. Evans*, 8 Geo. R. 145. *Geo. W. Towns, Governor, use, &c. vs. John Springer et al.* 9 Geo. Rep. 130.

[3.] Again: the judgment of a Court *having jurisdiction*, may be set aside by a decree in Chancery for fraud or accident, or the act of the adverse party, unmixed with negligence or fault on the part of complainant. 2 *Kelly*, 279. 1 *Ibid*, 136.

[4.] Again: the judgment of a Court of competent jurisdiction cannot be attacked, collaterally, in any other Court for irregularity, and, in all Courts, is to be held and taken as a valid judgment until it is reversed or vacated. *Rodgers vs. Evans*, 8 Geo. Rep. 145, and the numerous authorities there referred to.

[5.] Again: the judgment of a Court of competent jurisdiction, may be set aside by the Court which rendered it, for irregularity. 1 *M. Con. Reps. So. Ca.* 133. 1 *McMullan's R.* 292. 1 *Hill S. C. R.* 262. 3 *McCord*, 19.

[6.] The judgment of the Court of Ordinary, discharging an administrator, executor or guardian, has nothing in it peculiar—it is like any other judgment, and is subject to the rules above laid down. The Court having jurisdiction of the parties and the subject matter, it is not to be held, under the first proposition, a mere nullity in any and every other jurisdiction. Having jurisdiction, it is to be held and taken as a valid judgment until reversed or vacated, and it may be set aside in Chancery for fraud, and may be set aside, in the Court which rendered it, by a proceeding instituted for that purpose for irregularity. In all other jurisdictions a judgment of a Court of competent jurisdiction is presumed to be regular—nay, it is presumed to be regular, in the Court which rendered it, until reversed, or until proceedings are instituted to reverse it. Upon the hearing of that proceeding, such presumption does not exist; for whether regular or not, is the question there to be tried. What then do we mean when we say that a judgment of discharge is conclusive upon the parties, and a complete bar, unless assailable for fraud? We mean to say that, if it is a regu-

lar judgment, it is **conclusive**; and, if irregular, it is no judgment. We mean to say that, whilst it is to be taken as regular, until the contrary legally appears, yet it may be vacated because of irregularity.

In this case, the administrator being discharged by the Ordinary, a proceeding, by *scire facias*, was instituted before that Court to vacate that judgment. . By a judgment of the Ordinary, its judgment of discharge was revoked; the administrator appealed to the Superior Court, and, upon the appeal trial, the questions were made which come to us for review. This, then, is an attempt by a proceeding, (*sci. fa.*) instituted before the Court of Ordinary, to vacate a judgment discharging an administrator rendered by that Court. It is claimed that the judgment is irregular, and the grounds of irregularity are set forth in the *scire facias*. Whether it is or not, was the issue. Upon the trial of that issue, the presumption, as before stated, arising from the judgment itself, that the proceedings were all regular, does not obtain. On the other hand, it is clear that the Court had no power to review the evidence upon which the judgment was rendered—it could not inquire into the accounts of the administrator—into the merits of the cause as it stood before the Ordinary. It is charged in the *scire facias*, that the administrator fraudulently represented that he had fully and fairly settled the estate and executed his trust, and that the Court was deceived and misled by these representations. It is further charged, that these representations were false, and that they are false in this, that he corruptly colluded with one Edingfield, and permitted him to recover, by suit against the estate, a family of negroes worth fifteen hundred dollars. Upon the trial, the respondent offered to prove the representations to the Court, and the fraudulent collusion of the administrator with Edingfield, but was not permitted by the presiding Judge, and upon this error is assigned. Fraud in procuring a judgment is ground for its reversal, both at Law and in Equity; it is an irregularity which vacates it. It may be inquired into by the Court which rendered the judgment. "That the Court of Law," says Mr. J. Oneal, in *Dial & Henderson vs. Farrow*, (1 McMullan, 292,) "has not the power to set

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aside its own judgments, when founded in fraud, would be a strong proposition. For certainly, if the judgment becomes thereby void, and another tribunal could relieve against it, there can be no good reason why the Court pronouncing the judgment should not vacate it. Indeed there is great propriety in a Court vacating its own judgment, when it is rendered under such circumstances of mistake, fraud or surprise as would entitle the party to relief elsewhere." In that case the Court ordered an issue to try the question of fraud. In *Posey vs. Underwood*, (1 *Hill S. C. R.* 262,) the Court say that the power to set aside judgments is exercised as between the parties on matters out of and beyond the record, as when a judgment has been obtained by duress, by misrepresentation to the defendant or an abuse of the process of the Court. 1 *Green*. 263. Representations made to the Court of Ordinary, upon which they acted, coupled with proof of acts by the administrator which falsify them, clearly establish a fraud—a fraud upon the Court which will vacate the judgment. The proof ought to have been admitted, not by way of proving maladministration, not to establish a devastavit and on that account to vacate the judgment, but to show a fraud upon the Court and the minors in procuring the judgment. The propriety of this will appear by considering how loosely this matter is conducted by our Courts of Ordinary. Very often, I have no doubt, letters of dismissal are granted without any inquiry into the accounts, upon the bare statement of the administrator that he has settled the estate. How far this party will prove this fraud, we know not; he ought to be allowed to prove it if he can. On this account we send the cause back.

Let the judgment be reversed.

No. 49.—EDWARD CAREY, assignee, &c. and others, plaintiffs in error, vs. JNO. M. GILES, Receiver, &c. defendant.

- [1.]** The constitutionality of the Acts of the Legislature of 1832 and 1833, authorizing the Governor to appoint a receiver to take charge of the assets of the Bank of Macon, and clothing him with power to maintain all suits at Law and in Equity in his own name, affirmed:
- [2.]** The appointment of a receiver, by the Legislature, to settle the affairs of an insolvent bank, is not a judicial act.
- [3.]** The remedy—the mode and manner of enforcing contracts is no part of their obligation, and is within the legislative control.
- [4.]** A solemn Act of the Government will not be set aside by the Courts, in a doubtful case. The incompatibility or repugnancy, between the Statute and the Constitution, must be clear and palpable.
- [5.]** Acts of a Legislature, constitutionally organized, are to be presumed constitutional, and it is only when they manifestly infringe some of the provisions of the Constitution, or violate the rights of the citizen, that their operation should be impeded by judicial power. Whenever this does happen, from inadvertence or other cause, it becomes the duty of the Courts to protect the citizen and vindicate the Constitution.
- [6.]** A Statute passed for the suppression of fraud, or to give a more speedy remedy for the recovery of a right, ought to be construed liberally—such construction being for the furtherance of justice.

In Equity, in Twiggs Superior Court. Decision by Judge HANSELL, October Term, 1850.

The Bank of Columbus instituted suits in the County of Twiggs, against H. H. Tarver and others, to collect certain promissory notes transferred to the Bank of Columbus by the Bank of Macon, a short time before its failure.

Charles H. Rice, as the receiver of the assets of the Bank of Macon, pending these suits, filed a bill alleging the transfer of the notes to be fraudulent, and claiming the notes as a portion of the assets of the Bank of Macon. Pending the bill, viz: in November, 1849, Rice departed this life, and on the 4th day of April, 1850, the Governor, Geo. W. Towns, appointed John M. Giles, Esq. receiver, in the place and stead of said Rice, by virtue of an Act of the Legislature, passed on the 24th December,

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1832.* Giles appeared and moved the Court (it being agreed by counsel that the question might be raised in this manner) to be made a party to this bill, and that the same be revived, &c. The Court granted the motion, and this decision is alleged to be erroneous.

W. DOUGHERTY, for plaintiffs in error.

S. T. BAILEY, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

The Bank of Columbus; by Edward Carey, the assignee, instituted suit in Twiggs County against Hartwell H. Tarver and others, to collect certain notes transferred to the Columbus Bank by the Bank of Macon, a short time before its failure. One Rice, as the receiver of the Bank of Macon, appointed by the Governor, under the authority of the Legislature, pending said suits, filed his bill alleging said transfer to have been fraudulent, and claimed said notes as a portion of the assets of the Bank of Macon. In November, 1849, Rice died, and in April, 1850, John M. Giles was appointed by the Governor in his place. Mr. Giles prayed to be made a party complainant to the proceeding in Chancery, as successor of Rice, which application was resisted on the part of Edward Carey, as assignee of the Columbus Bank. It was agreed, however, that it might be done *on motion*, provided it could be done in any other way. Judge Hansell de-

*Extract from Act of 1832, forfeiting charter of Bank of Macon:

"Sec. II. His Excellency the Governor, immediately after the passing of this Act, [shall] appoint some fit and proper person to act as receiver of the assets of the Bank of Macon, and who shall be authorized to ask and receive from any person or persons holding any of said assets, and forthwith to collect the same and apply the proceeds to the redemption of the bills in circulation, so far as said proceeds shall be available; and further, that said individual shall give bond and security to His Excellency the Governor, and his successors in office, for the faithful performance of the duties of said office, and that said receiver report annually to His Excellency the Governor, his actings and doings, until the duties of his said office be completed."

Terminated that Mr. Giles could, by bill of review, be made a party; and to this decision counsel for Carey excepted.

[1.] The question in this case is narrowed down to an isolated point, namely: the constitutionality of the Acts of the General Assembly of 1832 and 1833. By the former, the Governor was authorized to appoint some fit and proper person to act as receiver. See *Pamphlet Acts of 1832*, p. 28. But doubts having arisen as to the power of the receiver to sue in his own name, the ensuing Legislature clothed him with power and authority to bring any action or suit at Law or in Equity in his own name which he might deem necessary for the collection of all debts due and owing to the bank, &c. See *Pamphlet Acts of 1833*, p. 39. By the 13th section of the charter of the Bank of Macon, it is declared, that "if the bank shall at any time fail or refuse to redeem their notes in specie, and the same shall be protested before a Notary Public to the amount of \$25,000, or if the notes or bills issued by said bank should depreciate and not pass currently without a discount on the same of ten per cent. or upwards, the Legislature, upon either of these facts being satisfactorily established or made known to them (without resorting to the Courts of Justice,) may pronounce the charter forfeited, and suspend all further operations of said bank; *Provided*, that nothing therein contained shall prevent said corporation, in case of forfeiture, from suing and collecting, in their corporate capacity, all debts previously due them, and of being sued and compelled to pay all debts due by said corporation." *Dawson's Compilation*, p. 74.

A committee was appointed in 1832 to investigate the condition of the Bank of Macon, who concluded their report by recommending a repeal of the Act incorporating said bank, both on account of its having failed to redeem its notes in specie, in terms of its charter, and because its bills were at that time at a discount of at least seventy-five per cent. From the report of the committee, it appeared that all or nearly all of the stock of the company had accumulated in the hands of one individual, and that he was dead and insolvent. From which facts, the conclusion is irresistible, that the corporation as such could never be

revived—I speak it with reverence—by any power short of that which raised up Lazarus from the grave. *Pamphlet Acts of 1832, pp. 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295.*

Accordingly, the Legislature at the same session, by virtue of the right reserved to itself in the charter, and without waiting to have the delinquency of the bank judicially ascertained, after reciting in the preamble that the bank had failed and refused to redeem its notes in specie, and that the same had ceased to pass currently, and were then at a great depreciation, passed an Act declaring the charter to be null and void, and that the rights, privileges and immunities which had been granted should thenceforth cease, determine and be of no effect. They then proceed and annex the same *proviso* that is contained in the charter, as already quoted, namely: that nothing contained in this repealing Act shall prevent said corporation from suing and collecting, in their corporate capacity, all debts previously due them, and being sued and compelled to pay all debts due by said corporation, and, in the following section, authority is given to the Governor to appoint a receiver as already noticed.

No question is raised as to the right of the Legislature to repeal the charter. It is contended, however—

1st. That the appointment of a receiver is a judicial act; and

2d. That it impairs the obligation of contract, by taking from the bank the right secured to it by its charter of suing and being sued in its corporate capacity.

[2.] 1st. Was the appointment of a receiver a judicial act? If so, it is very clear that it could not be made by the Legislature, without violating an express provision of the Constitution. But it does not seem to us to be of this description of power. It was not a case of controversy between party and party; nor is there any decree or judgment affecting the title to property; it determines no right, legal or equitable. The receiver is merely to collect, hold and disburse the assets of the bank for the benefit of all concerned; and it is in the power of the Courts to direct and control him in the proper execution of his duties.

2d. Even admitting that the defunct corporation could be re-

vived so far as to organize a board of directors, and this was a contest between the company and the receiver as to the right to control the assets of the bank, I should entertain serious doubts whether the clause in the charter should be so construed as to give to the corporation, under the facts and circumstances of this case, the preference which is here claimed. It is very certain that the Legislature of 1832 did not believe that in the appointment of a receiver they were in any manner interfering with the rights of the corporation. For the identical clause in the charter, as to their right of suing and being sued in their corporate capacity, is expressly re-enacted in the repealing Act. For myself, I think that it was intended by the Legislature, and so understood by both parties at the time, that this provision in the charter was designed to prevent the operation of the ancient doctrine, that upon the dissolution of a corporation, all debts for and against it were extinguished, and that their property reverted to the donor or escheated to the government. It was to prevent this consequence, and for no other purpose, I apprehend, that this clause was inserted. But suppose that it is otherwise, and that it guaranties to the Bank the privilege which is claimed for it, is there any thing in the appointment of a receiver which necessarily interferes with this right? Who is it that is interposing this objection? Not the corporation itself, but a creditor of the bank. And how, I ask, is the Bank of Columbus prejudiced by this appointment? What interest of theirs is disturbed by it? On the other hand, it is due to the other creditors of this insolvent concern, that there should be somebody, *in esse*, to litigate with the Bank of Columbus respecting these assets. If the Columbus Bank has the better title to them, she will prevail; if she has not, she ought to be defeated. The appointment of the receiver is to preserve, not to divest rights. That it should be resisted by the debtors of the corporation and those who chance to hold its funds and effects, is natural enough. But that the creditors should insist that it is divesting vested rights, seems a little unaccountable. The object is to fulfil contracts, not to violate them. Had the Legislature repealed this charter, without providing for the settlement of its affairs, they would have been

anything but the vigilant guardians of an innocent community. Better that this incurable cancer should have been let alone, to fester and feed upon the vitals of the body politic, than to have amputated it and taken no steps to bind up the wound. To have repealed the charter, without doing anything more, was to make bad worse.

But *McLaren vs. Pennington et al.* (1 *Paige's Rep.* 102,) is a case directly in point. While all the conservative doctrines in the *Bank of Columbia vs. Oakley*, (4 *Wheaton*, 236, 245,) *Young vs. The Bank of Alexandria*, (4 *Cranch*, 395,) and *Dartmouth College vs. Woodward*, (4 *Wheaton*, 518,) were re-affirmed by the learned Chancellor, yet he maintained, that notwithstanding there was no provision for the appointment of trustees by the Legislature, in the event of the dissolution of the charter, but, on the contrary, there was an express grant and stipulation that, in case of forfeiture, the officers of the bank should be the trustees to settle its affairs, still the Act of the Legislature, appointing other trustees and giving them control over all the property of the bank, was valid.

[3.] The remedy or mode and manner of enforcing contracts have never been considered as a part of their obligation, and have always been deemed within the legislative control.

[4.] If the constitutionality of the Acts of 1832 and 1833 was the least doubtful, it would be our duty to carry them into effect. To set them aside, their repugnancy to the Constitution should be most manifest. It is contrary to the practice and policy of this Court, as it should be of all others, rashly and lightly to pronounce void a solemn Act of the Government; the case must be clear to justify it.

[5.] "The question whether a law be void for its repugnance to the Constitution," said Chief Justice *Marshall*, in the case of *Fletcher and Peck*, "is at all times a question of great delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The opposition between the Law and the Constitution should be such that the Judge feels a clear and strong conviction of their incompatibility with each other." And in *Dartmouth College vs. Woodward*, the Court say, "on more than

On one occasion the Court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative Act to be contrary to the Constitution." In *Calder vs. Bull*, (3 *Dall. R.* 386,) the Chief Justice says: "If ever I exercise the jurisdiction, I will never decide any law to be void but in a very clear case." Again, in *Cooper vs. Telfair*, (4 *Dall. Rep.* 14,) the Court say, "to authorize this Court to pronounce any law to be void, it must be a clear, unequivocal breach of the Constitution—not a doubtful and argumentative implication." Such is uniformly avowed to be the governing principle with the Supreme Court of the United States—the highest judicial tribunal in the country. And the language of the English Judges, from the earliest history of the law, has been in accordance with the sentiments expressed by the Supreme Court.

[6:] Besides, it is a fundamental maxim of the Common Law, as laid down by Lord Bacon, and one which is never lost sight of by the Courts, that a Statute made for the suppression of a fraud, or to give a more speedy remedy for a right, ought to be construed liberally, because such construction is for the furtherance of justice. 6 *Bacon's Abr.* 389.

But we are averse to setting aside these Statutes, authorizing the appointment of a receiver, for another reason. Coeval with their passage, their constitutionality was sustained by the convention of Judges at Milledgeville; and I may say of this Bench, without transgressing the bounds of truth, that our judicial hemisphere was illuminated at this epoch by a constellation of bright stars, whose effulgence has never been eclipsed at any period of our history.

The question came up in this form: G. B. Hargrove having been appointed receiver of the assets of the Bank of Macon, moved a rule *nisi* against Carlton B. Cole, Esq. in Bibb Superior Court, calling upon him to show cause why a rule absolute should not pass against him, to compel him to deliver over to the said receiver the assets of said bank, held in his hands as attorney at law. The rule absolute was resisted, on the grounds that the

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Act of the Legislature, repealing the charter of the Bank of Macon and appointing a receiver, was unconstitutional, and therefore void, *and that in no case could the Legislature take the control of the funds from the corporation and give it to a receiver ; that no one but the corporation had the power to sue and collect their funds, and that all suits must be in the name of the corporation ; and, furthermore, that the appointment of a receiver was a judicial act, and therefore his appointment was void, because it violated that clause of the Constitution which says the several departments of the government shall be kept separate.* I make this statement from the printed brief of S. S. Bailey, Esq. submitted to the convention on the occasion, and from which I learn, also, that his application in behalf of the receiver was opposed by the late Judge *Shorter*, and “*a multitude*” of the ablest counsel then at the bar. The decision was made, therefore, upon deliberation, and the most elaborate reference to authorities, and covers the identical points made in the bill of exceptions before us. Property has been conveyed, and titles executed, and settlements, involving a great variety of interests, have been made under it, for twenty years. To overturn it now, would produce incalculable mischief and confusion. We feel no inclination to do so ; but, on the contrary, fully concur with that body in putting the seal of our approbation to the equitable and enlightened purpose of the Legislature, in taking the necessary and proper step which they did, to make the common fund of this corporation answerable for the debts which were created on the credit of that fund.

Upon the whole, we see no error in the record, and consequently affirm the judgment of the Circuit Court.

No. 50.—ELIZABETH H. HOPKINS, for herself, and as guardian of Susan A. Hopkins, plaintiffs in error, *vs.* GEORGE LONG *et al.* executors of W. T. Hopkins, deceased, defendants.

[1.] According to the provisions of the Act of 1838, the widows and orphans of testators and intestates, are entitled to a reasonable support and maintenance out of their estates, for the space of twelve months immediately after the death of such testator or intestate, whether their estates be solvent or insolvent.

In Equity, in Camden Superior Court. Tried before Judge H. R. JACKSON, November Term, 1850.

This cause was brought before this Court upon the following agreed statement of facts :

William T. Hopkins died about the month of March, 1848. He left a widow and one child—the complainants. He also left a will, appointing the defendants in error executors, who shortly thereafter qualified as such. By this will he devised and bequeathed to his wife, the complainant, as follows : “ I devise and bequeath the following property, viz : seventeen negroes, with their future issue and increase (naming them ;) also my dwelling-house on Cedar Hill plantation, &c. also my carriage and horses ; also one sixth part of all my stock of every description ; also one sixth part of all my plantation tools and utensils ; also one tenth part of all my ready money, and one tenth part of all crops which may be unsold at the time of my death, unto my wife, Elizabeth H. Hopkins, to have and to hold the same during her widowhood” (except the ready money given absolutely.) The legacy was declared to be in lieu of dower, and after death of wife, remainder over to the other complainant, his child ; to whom there was also given another legacy of a considerable portion of his estate. A large portion of the estate was given to third persons.

Within a year after the death of the testator, the executors delivered to complainant, Elizabeth H. Hopkins, sixteen of the negroes bequeathed to her, and all the specific legacies and dev

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ses (except the tenth of the crops and ready money, amounting to \$2897 93.) In June, 1850, complainant was appointed guardian for Susan Anna Hopkins, the other complainant, and from that time, the executors paid to her, as guardian, divers sums of money bequeathed to her ward. The executors refused to pay the complainants anything for their support and maintenance, during the twelve months succeeding the death of testator, separate and apart from their legacies, which complainants claimed under the Act of 1838 for the relief of widows and orphans.

The complainants filed their bill to recover a reasonable amount for such support and maintenance, which the defendants answered, denying their right, under the Act.

Upon the trial, the presiding Judge charged the Jury, that the Act of 1838 did not refer to solvent estates, where legacies and devises or distributive shares were going to the widow and family of the deceased, and the complainants were consequently not entitled to recover.

This decision is brought before this Court for review.

R. M. CHARLTON, for plaintiffs in error.

LLOYD and OWENS, for defendants.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question made by the record in this case is, whether the widow and child of the testator are entitled to a reasonable support and maintenance, for twelve months next ensuing after his death, out of his estate, under the provisions of the Act of 1838. The Court below ruled, that the Act applied to *insolvent* estates only, and not to *solvent* estates. We are of the opinion, from a careful reading of the enacting clause of the Statute, when taken in connexion with the title thereof, that it was the intention of the Legislature to make provision for the support and maintenance of the widow and children of the testator or intestate, for the space of twelve months immediately

after his death, according to their rank and condition in life, whether the estate be solvent or insolvent.

The Act is entitled. "an Act for the relief and support of widows and orphans out of the *estates of their deceased husbands and parents.*"

The Act declares, that "when any person shall die, leaving a widow and children, or a widow or child, it shall and may be lawful for the executor or administrator thereof to allow, out of the effects of such deceased person, a *reasonable* support and maintenance for the space of twelve months next ensuing immediately after the death of such testator or intestate, notwithstanding any debts, dues or obligations of said testator or intestate.. *Pamphlet Laws of 1838, 201.*

It will be perceived that the widows and orphans of *solvent* testators or intestates, are embraced in the general words of the Act, as well as the widows and orphans of *insolvent* testators and intestates; besides it cannot always be ascertained, until at least twelve months after the death of the testator or intestate, whether his estate will be solvent or insolvent, and in that event, the widow and children would be left to the mercy of the executor or administrator, who would be quite as likely to look to his own safety and the interest of the creditors of the estate, as to the immediate wants of the widow and children. The widows and orphans of *solvent* testators and intestates, are not made an exception in the Statute, and we shall not make them so by judicial legislation.

Let the judgment of the Court below be reversed.

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No. 51.—ANTHONY, a slave, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error

- [1.] In prosecutions of slaves under the Act of 1850: *Held*, not to be necessary to aver the preliminary proceedings before the Magistrates, in the bill of indictment, nor to prove them on the trial.
- [2.] The constitutionality of the Act of 1850, authorizing the trial of slaves before the Superior Court, sustained.
- [3.] In prosecutions under this Act for murder, and verdict of manslaughter: *Held*, that the Superior Court may pass sentence and inflict the punishment provided by law for manslaughter.

Indictment for murder—conviction for manslaughter, in McIntosh Superior Court. Tried before Judge HENRY R. JACKSON, November Term, 1850.

Anthony, a slave, was indicted in McIntosh Superior Court, for the murder of Ben Cousins, a free man of color. The indictment was framed in the usual form.

The Jury found a verdict of guilty of voluntary manslaughter; whereupon counsel for plaintiff in error moved, in arrest of judgment, on the following grounds:

1st. Because it being a case of voluntary manslaughter, the Court had no jurisdiction, and could not punish.

2d. Because the preliminary proceedings had before the committing Magistrates, were not set forth in the indictment, so as to show that the Court had jurisdiction of the cause, or to show with what offence the prisoner was charged by the Magistrates.

3d. Because the Act of 1850, under which the trial was had, is unconstitutional and void.

Which motion was overruled, and this decision is alleged to be erroneous.

L. S. DELYON, for plaintiff in error.

Sol. Gen. GAULDEN, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] In this assignment it is charged as error, that the presiding Judge held it unnecessary to set forth, in the bill of indictment against the slave, the opinion, in writing, of the Justices by whom he was committed, that he had committed a capital offence, and the other papers appertaining to the charge against him, and that, on the trial, it was unnecessary to prove them. Under the old law it was necessary, in proceeding against a slave for a capital offence before the *Inferior Court*, to prove the preliminary proceedings before the Magistrates, and for very good reason. The *Inferior Court*, being a Court of limited jurisdiction, its jurisdiction over the offence charged against the slave ought to appear on the record of its action. By the Act of 1811, the *Inferior Court* is directed to try slaves, when, after a hearing before the Magistrates, it is made to appear to them that he is guilty of a capital offence, and they are notified of that fact. The preliminary proceedings before the Magistrates, and their judgment as to the character of the offence, and their notice to the Justices of the Inferior Court, are made to supply the place of indictment and finding thereon by the Grand Jury, or presentment by the Jury and indictment thereon in case of white persons. The Act of 1811 contemplates and provides for no preliminary inquiry before the Grand Jury, by way of presentment or finding on a bill. The *Inferior Court* took jurisdiction upon the proceedings before the committing Magistrates. With great reason, therefore, was it held, that upon the trial these proceedings should be proven. *Judge, a slave, vs. The State of Georgia*, 8 Geo. Rep. 173.

Very different stands the case under the Act of 1850. It is true that, by that Act, a preliminary inquiry upon the charge made against a slave, by the Justices of the Peace, may be had; and if after their investigation, they are of opinion that the slave is guilty of a capital offence, they having no jurisdiction of that offence, are required to certify their opinion, in writing, and transmit the same, together with a report in writing of the evi-

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dence taken before them on the examination, and all other papers appertaining to the charge against the slave, to the Attorney or Solicitor General, being the prosecuting officer in the *Superior Court* of the County, on the first day of the next term of said Court; but for what purpose? Not that the *Superior Court* shall, upon their opinion and the other papers and evidence appertaining to the charge thus transmitted, proceed to try the slave, as under the Act of 1811, the Inferior Court would do; but that being thus notified of a capital offence being charged upon a slave, the Attorney or Solicitor General might frame and send before the Grand Jury a bill of indictment against the slave so charged, as in cases of free white persons. The second section of the Act provides, "that upon receiving the papers in any such case, as provided in the preceding section, it shall be the duty of such Attorney or Solicitor General to frame and send before the Grand Jury a bill of indictment against the person or persons so charged, as in cases of free white persons." And the Act further declares, "and in any case wherein a slave or free person of color shall have been committed, and a return made of the papers to the Attorney or Solicitor General, as provided in the first section of this Act, if there shall be no prosecutor bound or appearing to prosecute the case, it shall be the duty of the Attorney or Solicitor General to place before the Grand Jury such charge, made by such Justices of the Peace, together with all legal testimony sustaining it, which may be accessible to him, and said Grand Jury may, upon such evidence, in their discretion, present such offence to the Court." *Pamphlet* 1849 '50, p. 372. From these provisions of the Act of 1850, it is clear that the transmission of these papers to the Attorney or Solicitor General, is merely *directory to him*, and that they constitute no part of the pleadings or proofs before the Superior Court. It is only a form by which the Justices of the Peace are made to disclaim jurisdiction in capital cases, and by which the prosecuting officer is notified that a capital offence has been committed. The papers do not give the jurisdiction to the Superior Court. The Act confers it upon that Court, irrespective of them; for it makes it the duty of the Attorney or Solicitor General, upon receipt of

them, to frame a bill against the slave charged, and send it before the Grand Jury, if there is a prosecutor, and, if none, then to lay them before the Grand Jury, that they may present the offence to the Court, and a bill of indictment be founded thereon. These things are to be done, *as in cases of free white persons*. Upon being thus certified that an offence has been committed, it is made his duty, upon his responsibility as an officer of the State, to prosecute the person (slave) charged, as he would a white citizen charged with an offence against the laws; and the slave, as to all his rights of defence, is put upon the same platform with a white man. He is to be tried only upon bill found true by the Grand Jury, or upon a bill founded on presentment by the Grand Jury. The Court, as before stated, does not derive its jurisdiction from the return of the papers. This is manifest in this, that the Act makes it lawful, independent of them, for the Grand Jury to present to the Court any offence committed by a slave or free person of color in the County; upon which presentment, indictment and trial proceed. Nor do I doubt but that it would be the duty of the Solicitor General, upon information, without such return, to frame a bill, and, if found, of the Court to try a slave or free person of color for a capital offence. The Superior Court, too, being a Court of general jurisdiction, it is not necessary to assert its jurisdiction in these cases, upon its records, as in cases of Courts of limited jurisdiction. With such views of the Act of 1850, we find no error in this assignment.

It is farther assumed, in the assignment, that the Court erred in holding that the Superior Court could rightfully entertain jurisdiction in this case. The argument, if I understood the counsel correctly, divided the question of jurisdiction into two propositions—

1st. The Superior Courts have no jurisdiction, under the Constitution, to try slaves for criminal charges, and the Act of 1850, which confers it, is void for unconstitutionality.

2d. If the Superior Courts have, constitutionally, jurisdiction of capital offences, committed by a slave or free person of color, yet, under the laws of Georgia, they have no jurisdiction of the

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offence, to wit:• manslaughter, of which the accused was in this case found guilty by the Jury, and cannot, therefore, punish him for that offence.

[2.] We hold that the Act of 1850, giving to slaves and free persons of color the same rights of trial, when charged with capital offences, which the laws accord to white persons, reflects distinguished honor upon the State, and exhibits, in clear and strong lights, the humanity of our laws towards them. They are arraigned upon indictment first passed upon by the Grand Jury—a body of men selected for their wisdom, age and prudence, and on account of the interest which they hold in this, as well as all other kinds of property. They are protected, on the trial, by those forms of pleading and rules of evidence, which, under similar charges, protect the citizen; they are represented by counsel, and are tried by a Jury. Thus it is, that by this Act, as well as by numerous other provisions of the law, whilst they are, in law and in fact, property, they are recognized as human creatures. For the justice and humanity of the slaveholding State of Georgia, an appeal well lies from the slanderous imputations of the ignorant, the fanatical, or the wilfully base, to the law which I now review. On these, as well as other accounts, this Court has been solicitous—indeed anxious—to be able to sustain the Act of 1850. Not that, prior to the Act of '50, the slave and the free person of color had no such rights as that Act guarantees to them, (for in fact, before the Act of 1850, the right of trial by Jury, in capital cases, was secured to them,) but because it subjects them to trial before a higher and more competent tribunal, and with more ample safeguards of right and justice. With satisfaction, therefore, we find it our duty and privilege to sustain the constitutionality of the Act of 1850. The argument, on either side, as to the constitutionality of this law, pursues but a limited range. I shall not weaken what is strong, by any attempt at subtle deductions or remote analogies. So much of the Constitution of the State of Georgia as relates to this subject, is in the following words: “The Superior Courts shall have *exclusive* jurisdiction in all criminal cases. (*except as relates to people of color, and fines for neglect*

duty and for contempt of Court, for violations against road laws, and for obstructing water courses, which shall *be vested* in such judicature or tribunal as shall be or may have been pointed out by law; and except in all other minor offences committed ~~by~~ ~~by~~ free white persons, and which do not subject the offender or ~~offenders~~ to loss of life, limb, or member, or to confinement in ~~the~~ penitentiary, in all such cases, corporation Courts, such as ~~now~~ exist or may hereafter be constituted in any incorporated city, being a seaport town and a port of entry, may be vested with jurisdiction under such rules and regulations as the Legislature may hereafter by law direct,) which shall be tried in the County where the crime was committed," &c. &c. By the Act of 1811, the Legislature gave to the *Inferior Courts* the power to try slaves for capital offences. The argument for the unconstitutionality of the Act of 1850, which confers that power upon the *Superior Courts*, is as follows: The Constitution gives to the *Superior Courts* exclusive criminal jurisdiction in all cases, *except* as relates to people of color, &c. The exception denies to the *Superior Courts* jurisdiction, as relates to people of color. Not only so, but in the excepting clause it declares that jurisdiction, as relates to people of color, in criminal cases, *shall be vested* in such judicature or tribunal as shall be or may have been pointed out by law. The Legislature, in 1811, by law, in obedience to the mandate of the Constitution, pointed out the Inferior Court, as the tribunal in which criminal jurisdiction, as relates to people of color, in capital cases, should vest, and declared the manner in which that jurisdiction should be exercised. When the Legislature had acted and ordained a tribunal, as required by the Constitution, for the trial of people of color, the law which embodies that action became fundamental—a part of the Constitution. As a necessary inference from these propositions, the Act of 1811 is a part of the Constitution, and cannot be repealed by a mere act of legislation; and the Act of 1850, which repeals it, is void, as being repugnant to the Constitution. In reply, I say that the denial in the exception is not of *jurisdiction*, but of *exclusive* jurisdiction. The grant to the Superior Court is *exclusive* jurisdiction, in all criminal cases. The exception

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refers to the grant, and is limited by it. The exception, therefore, only denies to the *Superior Court exclusive* jurisdiction, as relates to people of color. Jurisdiction, concurrent with such tribunal as the Legislature might point out for the trial of people of color, remains, under the Constitution, in the Superior Court. And the jurisdiction which the exception declares shall be vested in such tribunal, is not exclusive, but is itself concurrent with that which is left with the Superior Court. This concurrent jurisdiction, which remains in the Superior Court, has been dormant. In point of fact, the Superior Courts never have, so far as I know, exercised it. Certainly not since the Act of 1811, until the Act of 1850, and for this very satisfactory reason: The Legislature, by the Act of 1811, pointed out a tribunal to try people of color; up to 1850, that tribunal was considered adequate to that service. The Legislature did not consider that the necessities of the case required the exercise of this jurisdiction by the Superior Court. They did not, therefore, until 1850, provide by law for its exercise; they did not point out the manner in which the Superior Courts should exercise it; they did point out the manner in which the Inferior Courts should exercise it. The power to try people of color lay, by constitutional deposit, in the hands of the Superior Court, to be sprung into activity, if the Legislature should at any time deem it expedient by proper legislation. Under this view of the subject, it was competent for the Legislature in 1811 to have, by law, declared that the trial of people of color, for capital offences, should devolve upon the Superior Court, as well as the Inferior Court, and to have there pointed out the manner in which the trial before the Superior Court should proceed. So it was competent in 1850, for the Legislature to do the same thing, and equally competent for it to repeal the Act of 1811, and provide, as it did, for the trial of slaves before the Superior Court alone. For I apprehend it is an out-and-out error, to say that when the Legislature in 1811 acted, as authorized to act by the exception in the Constitution, that that Act became a part of the Constitution of the State. If the Constitution was not intended to fix the jurisdiction, as to people of color in criminal cases, exclusively in any

particular tribunal, but left the tribunal, whether the Superior, Inferior or any other Court, to be designated by the Legislature, then what Court should exercise it, was and is a matter of legislative discretion. That such was not the intention of the framers of the Constitution, is manifest in this: that the exception referred to, declares that this jurisdiction shall be vested in such judicature or tribunal as *shall be* or may have been pointed out by law; that is, it is left to the Legislature, by law, to say, in all the future, what existing judicature or tribunal, or tribunal or judicature especially created for the purpose, shall exercise the jurisdiction. And when the Legislature has pointed out the tribunal or tribunals, (in fact they have vested criminal jurisdiction over slaves in more than one,) there, for the time being, the jurisdiction rests. The Legislature is but the minister of the Constitution, to effectuate its provisions, in this regard—it acts by its law-making function. When it acts, as in 1811, like any other law, its action is subject to repeal or to modification; it does not bind future Legislatures. The Act of 1811, like any other law declaratory of the manner in which a constitutional provision shall be carried out, was subject to repeal, and was, as we hold, wisely and constitutionally repealed by the Act of 1850.

The idea that, under the Constitution, the concurrent jurisdiction, of which I have spoken, remains in the Superior Courts, is fortified by a consideration of other exceptions mentioned, to the exclusive jurisdiction of those Courts in criminal cases. Take, for example, fines for contempt of Court: by the argument, if the Legislature had, by law, (which it has not done, because unnecessary,) declared that the Inferior Court should have jurisdiction over contempts, with a power to fine, the Superior Courts would thereby be divested of their power to fine for contempts. But, in that event, could it be believed for a moment that the Superior Court would be divested of its power, incident to all Courts, to fine for contempts? The limitation upon the jurisdiction of the Superior Courts, in this instance, is clearly not intended to inhibit them from punishing for contempts, but to prevent such inhibition to other Courts, by the general grant of exclusive criminal jurisdiction, in all cases, to them. Take, also,

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the case of minor offences, committed by free white persons. The jurisdiction, as to this exception, is given to corporation Courts existing, or which may be hereafter constituted, in any incorporated city, being a seaport town and a port of entry. The Legislature has established such a Court in the City of Savannah; but it has never been held, I believe, that the Superior Courts have not there also jurisdiction of these minor offences. The object, in this instance, doubtless was to give concurrent jurisdiction to corporation Courts, with a view to expedite trials, and to disencumber the Superior Court of a part, at least, of that burdensome mass of criminal business with which it would be otherwise oppressed. The same reasons, I have no doubt, gave rise to the exception as to people of color.

But if it be conceded that, under the Constitution, by fair construction, concurrent jurisdiction, as to people of color, is not retained, yet it is clear that it is not *denied* to the Superior Courts. Nothing is denied, as before stated, but *exclusive* jurisdiction. This being so, what is there to prevent the Legislature, as it has done by the Act of 1850, from pointing out the Superior Court as the tribunal to be vested with criminal jurisdiction, as to people of color, in capital cases? Nothing, whatever. It is as free to receive the jurisdiction as any other judicature or tribunal. I concede that *exclusive* jurisdiction, as to people of color, is denied. But the Act of 1850 does not give it exclusive jurisdiction as to people of color; it gives it jurisdiction only as to capital offences—other offences are tried by law before other tribunals. It is exclusive, in fact, as to capital offences, inasmuch as by existing laws no other tribunal can try people of color for capital offences; but in no legal or constitutional sense is it exclusive, because it is legally and constitutionally competent for the Legislature to devolve the same power concurrently on other tribunals, if it thinks fit to do so. We hold, therefore, that the Act of 1850 is constitutional.

[3.] The prosecution, in this case, was not on presentment, but on bill found by the Grand Jury, and under the second proposition stated, as regards jurisdiction, it is insisted that the Court had no power to pass sentence by the Act of 1850, because

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That Act provides for sentence and punishment only in cases where the prosecution proceeds on presentment. Is this true? The Act declares, "that after a *bill of indictment, found true on presentment made as herein before provided*, the trial shall proceed to rendition of verdict, in conformity with the provisions of the Penal Code of this State, and in case of conviction, the Judge of the Superior Court, before whom such trial shall have been had, shall pass sentence, in conformity with the laws now in force, imposing penalties, and providing for sentences in such cases." It is true that the law, in its letter, limits the power of the Judge to pass sentence in a single case, and that is where there is a conviction, *after a bill of indictment found true, on presentment made*. This, like all other Statutes, is open to construction. Should we adopt the construction claimed by the plaintiff in error, and limit the power of the Court to pass sentence to the case of conviction, on a bill found true on presentment made, we would become obnoxious to the maxim, "*qui hæret in littera, hæret in cortice*;" we would verily go but skin deep into the meaning of the Act. The letter of the Act states an impossibility in the law; there is no such thing as a *bill found true on presentment made*. The Jury find a true bill or not, when a bill is laid before them, by the prosecuting officer, for their consideration. When they *present*, the bill is framed on the presentment, and is never sent to them for a finding. If the plaintiff's construction be the true one, and if there can be no bill found true on presentment made, the result is more serious than what he claims it to be, for there could be no sentence and no punishment in any case under this law; the whole Act would be an absurdity—a law which authorizes a trial without power to inflict punishment. It is our duty to give effect to it. The meaning of the Legislature is plain, and is not expressed fully, because, either in the drafting or the printing, the alternative little word *or* is omitted. They intended, no doubt, to say, "after a bill of indictment found true *or* on presentment made." This is clear by the intent and purposes of the whole Act; it is especially manifest in the words "as hereinbefore provided," which follow immediately the clause last quoted. These words refer to the provisions of the first section,

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which authorize the Solicitor General to frame and send a bill before the Grand Jury, to be found by them true or no bill, and which also authorize the Grand Jury to present. By the Act, the prosecution against the slave may originate with a bill sent before the Grand Jury, or in a presentment by the Jury. In either case, the Court proceeds to try, and, in case of conviction, to pass sentence. This interpretation makes the clause under review consistent with the whole Act, and relieves the Legislature of the imputation of having legislated absurdly. Can we add the word *or*? In just such a case, I have no doubt, we can. It is not an Act of legislation, but the reading of an Act which the clear meaning requires. We are not bound to decide according to the strict letter of the Act, but the real intention will prevail over the literal sense of terms. 3 *Reps.* 27. 1 *Kent*, 462. *Smith's Commentaries*, 662. 15 *Johns. R.* 380. 14 *Mass.* 92. *Plowd.* 289. 1 *Jarman on Wills*, 443, *et seq.* 7 *T. R.* 509. 11 *Rep.* 73. *Coke Litt.* 381, *h.*

Again: it is said that the Court could not pass sentence in this case because the verdict was manslaughter—the Act of 1850, conferring jurisdiction only in capital cases, and manslaughter not being a capital offence, when committed by a slave. The slave was indicted for murder; that being a capital offence, the Court clearly had jurisdiction of the cause. Upon this indictment, it was competent for the Jury to find the prisoner guilty of manslaughter. In just such a case, the Act of 1850, together with the Act of 1821, confer the power to punish. The former Act declares that, in case of conviction, (not of a capital offence, but generally,) *upon bill of indictment or presentment for a capital offence—for that is the meaning of the law—the Judge shall pass sentence in conformity with laws now of force, imposing penalties and providing for the passing of sentence in such cases.* For the sentence, the Act of 1850 remits the Court to the laws now in force, which impose penalties and provide sentence in such cases. What cases? Cases of indictment for capital offences. Well, the latter Act—the Act of 1821—declares “that whenever a slave or free person of color is brought before the Inferior Court, to be tried for an offence deemed capital, it shall be the duty of

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said Court to pass such sentence as may be pointed out by law for the offence of which such slave or free person of color may be guilty; *and in case a verdict of manslaughter shall be found by the Jury, the punishment shall be by whipping, at the discretion of the Court, and branded on the cheek with the letter M.* Prince, 799. Here, then, is a law which provides punishment for this case—a case where a slave, indicted for murder, is found guilty of manslaughter. It provides a penalty, and for a sentence in this case. It is not only not repealed by the Act of 1850, but is made part and parcel of it, by express reference. So far as it refers to the *Inferior* Court, it is repealed by the Act of 1850, but is, by that Act, declared in force, so far as it provides a penalty, and for a sentence in the case made in this record.

Let the judgment be affirmed.

No. 52.—JACOB WATSON, assignee, &c. plaintiff in error, *vs.*
HALSTED, TAYLOR & Co. defendants.

- [1.] An *alias fi. fa.* cannot regularly issue without an order of the Court for that purpose, which order should set forth all the previous proceedings which had taken place under the original execution.
- [2.] Where an *alias* execution has been issued by the Clerk, without such order, the objection to the regularity of the proceeding comes too late, after the parties had litigated a claim case under such *alias fi. fa.* The defect will be considered as having been waived.

Illegality, in Pulaski Superior Court. Tried before Judge HANSELL, October Term, 1850.

This was an affidavit of illegality filed by Robert N. Taylor, one of the firm of Halsted, Taylor & Co. to an *alias fi. fa.* issued in favor of Fellows, Wardsworth & Co. and controlled by Jacob Watson, upon the following grounds, among others:

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1st. Because the *alias fi. fa.* was issued by the Clerk, upon the application of Watson, without any petition to or order from the Superior Court, or any affidavit showing the loss or destruction of the original.

2d. Because it does not appear anywhere of record, that the original *fi. fa.* is not now in existence.

3d. Because the *alias fi. fa.* was issued without authority of law, and is null and void.

Upon the trial, counsel for Watson proposed to prove by the Clerk and Judge C. B. Cole, that the *alias* was issued during the time Judge Cole presided in said Superior Court, and that his practice, while Judge, was to direct the Clerks to issue *alias fi. fas.* in the manner of the one in controversy.

The Court rejected the evidence, and this decision is assigned as error.

Upon argument, the Court sustained the grounds of illegality above recited, and this decision is assigned as error.

Counsel for Watson then proposed to file an affidavit, *instanter*, of the loss or destruction of the original, and moved the Court for an order, *nunc pro tunc*, for the issuing of the *fi. fa.* in controversy.

The Court refused the motion, and this decision is assigned as error.

It appeared to the Court that the *alias fi. fa.* had been issued over four years, and had been in litigation with the affiant during the most of that time.

Counsel for Watson insisted that, under these circumstances, the irregularity had been waived by Taylor.

The Court overruled the position, and this decision is assigned as error.

C. B. COLE, for plaintiff in error.

S. T. BAILEY, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

Jacob Watson, holding an execution, by assignment from

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Fellows, Wardsworth & Co. against Halsted, Taylor & Co. caused it to be levied on the property of Robert N. Taylor, one of the defendants, who arrested the *fi. fa.* by an affidavit of illegality, on the ground that it had issued without authority of law.

The facts are these: The original execution was returned to the office, with the entry of "no property," by the Sheriff. Upon being applied for by Watson, the transferee, it could not be found; whereupon the Clerk issued this *alias fi. fa.* in accordance with the practice which then prevailed in the Southern Circuit. This *alias fi. fa.* was levied on the property of Taylor, one of the defendants, when the property was claimed by him, as *guardian*; and upon the trial of the claim, the Jury found the property not subject.

[1.] Under these circumstances, while we hold that an *alias fi. fa.* cannot issue upon the mere motion of the Clerk, but by authority alone of the Court, upon proof being furnished as to the loss of the original, and of the proceedings which had been had thereon, (all of which should be set forth in the order directing the *alias fi. fa.* to issue,) still we think the objection in this case comes too late.

[2.] It should have been made in 1846, when this *alias* execution was first levied. The irregularity could then have been cured, as the seven years statutory bar or limitation had not at that time attached.

The present case comes fully within the principle laid down in *Evans vs. Rogers*, (1 *Kelly*, 463,) that "whenever proceedings in Court are irregular, application to set them aside should be made in the first instance," and that "if the party, after discovering the irregularity, proceed himself and take subsequent steps in the cause, or lie by and suffer the other party to do so, the Court will not assist him."

Judgment reversed.

No. 53.—ELIZABETH NAIL, plaintiff in error, *vs.* JESSE MOBLEY, administrator, &c. and MORRIS NAIL, defendants.

[1.] Where a complainant, in a bill, claims one general right to property in the possession of two defendants, notwithstanding that right may be derived from distinct sources, a demurrer for multifariousness will be overruled.

In Equity, in Appling Superior Court. Decision on demurrer by Judge HANSELL, June Term, 1850.

Elizabeth Nail, by her bill, filed in Appling Superior Court, charged, that her father, Reuben Nail, in the year 1822, executed and delivered to her a deed of gift to certain slaves named, which deed she believed had been destroyed by Morris Nail or Jesse Mobley; that she took possession of the negroes, occasionally permitting them to go into the possession of her father; that in 1840, her father executed another deed of gift, conveying to her a number of negroes and several tracts of land, a copy of which deed was attached to the bill; that she took possession of the land and negroes, and was in the actual or constructive possession of them at the time of the death of her father, in April, 1846; that complainant and Morris Nail were the only distributees of Reuben Nail; that a few months before his death, Morris Nail and complainant had a dispute about this property, and it was agreed between them, that after the death of said Reuben, there should be an equitable division of the property, according to certain conditions specified in a written agreement between them; that in pursuance of this agreement, they paid up the debts of said Reuben after his death; that in 1847, Jesse Mobley obtained letters of administration upon the estate of Reuben Nail, and in virtue thereof, took possession of all the negroes and lands specified, except those in the possession of Morris Nail—said Morris absolutely refusing to comply with his agreement for an equitable division. The bill charged collusion and fraud between Morris Nail and the administrator, to deprive complainant of her property; and also that they were committing great waste in cutting and converting to their own use the timber upon the

lands specified ; that they obtained possession of her property, by falsely representing that if she would permit the said Jesse to take possession of the same, they would make the equitable division before referred to; but instead of so doing, they were jointly converting the same to their own use.

But "should the Court decide against her title under the deed," the bill then alleged that she was well entitled to one half of the estate of Reuben Nail. The bill specified the property he died possessed of, and charged the same to be in possession of the administrator, except a portion which he fraudulently permitted the said Morris Nail to keep possession of—refusing to reduce the same to possession. In this aspect, the bill charged a joint waste and conversion of the property of the estate by the administrator and Morris Nail.

The bill charged the inability of complainant to prove the facts charged, without resorting to the conscience of the defendant.

The prayer of the bill was first, that the defendant, Mobley, might be decreed to deliver up the property conveyed in the deeds to complainant, and might account with her for the hire and rent, and also for the timber converted to his own use; **OR**, that Morris Nail and the administrator might be decreed to account with each other and compelled to pay to complainant one half of the rents and profits of the estate, and that in the settlement, Morris Nail should account for all advancements made him, and that one half of the estate, real and personal, should be paid over and delivered to complainant; **OR**, for general relief.

On demurrer, the Court dismissed this bill for multifariousness in joining several and distinct matters against the same party, and also in joining several and distinct matters against several defendants.

This decision was excepted to, and is now assigned as error.

W. B. GAULDEN, for plaintiff in error.

C. B. COLE, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The complainant in this bill alleges that she has a title to certain property in the hands of the defendants, consisting of lands and negroes, by virtue of a deed of conveyance, executed to her by her father, Reuben Nail, who has departed this life intestate, and also claims one half of the estate of her deceased father, in the hands of the defendants, who, she alleges, have *fraudulently* combined together to deprive her of any share of the property to which she is entitled under the deed of conveyance or as the distributee of her deceased father, Reuben Nail, and for that purpose, Jesse Mobley took out letters of administration on the estate of her father, and is now colluding with her brother, Morris Nail, to defeat her in the enjoyment of any portion of the property, which it is alleged is in the possession of the defendants, and which they are and have been appropriating to their own use. The defendants demurred to the bill for multifariousness, which demurrer was sustained by the Court below, and the bill dismissed. What is multifariousness in a bill in Equity? It is the improperly joining in one bill *distinct* and *independent* matters, and thereby confounding them—as for example, the uniting in one bill of several matters perfectly *distinct* and unconnected against one defendant, or the demand of several matters of a *distinct* and *independent* nature against several defendants in the same bill. *Story's Equity Pleading*, 224, §271.

The complainant here claims one general right against the defendants. She claims that right, it is true, under the deed, and as the heir at law of her deceased father. All she claims of the defendants is, that they may be decreed to account with her for the land and negroes in their possession, to which she claims to be the owner, deriving her title thereto from two distinct sources, and the question on the trial will be, has she established her title to the whole of the property described in her bill, under the deed, or has she only established her title to one half of it, as the heir at law of Reuben Nail, deceased? In either event, she will be entitled to an account from the defendants, to the extent of her

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right. We do not perceive any difficulty or inconvenience which will arise in compelling the defendants, who are alleged to have her property in possession, from answering her allegations and accounting with her therefor. Courts of Equity do not favor this objection of multifariousness, as this Court has already announced, in *Warthen vs. Brantly & Daniel*, 5 Georgia Rep. 573. We overruled a demurrer for multifariousness in that case, and in *Butler vs. Durham*, (2 Kelly, 413,) and shall continue to do so, unless some *practical inconvenience* will manifestly be the result of maintaining the bill in Court. It is the interest of parties, as well as the interest of the public, that all matters in controversy between them should be settled by one suit, when it can be done with safety and without great practical inconvenience.

Let the judgment of the Court below be reversed.

NO. 54.—THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, plaintiffs in error, *vs.* THE SAVANNAH AND OGEECHEE CANAL COMPANY.

[1.] In a matter of complaint against the Savannah and Ogeechee Canal Company, that they were guilty of a nuisance, by obstructing the drainage of the low lands of the Springfield Plantation, the City Council of Savannah determined that they were guilty of the nuisance, and that they be notified to remove it within a specified time, by constructing an additional culvert; and, in default thereof, that the culvert be built by the city, *and that the company pay the costs of its construction*: Held, by this Court, that the resolution of the City Council of Savannah, that the costs of the culvert be paid by the Savannah and Ogeechee Canal Company, is not a judgment by which the rights of the company, as to their liability to pay such costs, are concluded, and that the City Council had the power to pass such a resolution.

Application for *certiorari*. Decision by Judge HENRY R. JACKSON; November, 1850.

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On the 29th day of August, 1850, Mr. Amos Scudder, the President of the Savannah and Ogeechee Canal Company, was notified by the Clerk of the City Council of Savannah, that the canal embankment constituted an obstruction to the drainage of a portion of the city, and required the company to construct an additional culvert, giving its dimensions, &c. or else show cause why it should not be abated as a nuisance.

The company, by their President, showed cause, alleging, among other things, that the necessity for another culvert, if any existed, was the result of the act of the Council themselves. The showing was overruled, and two resolutions were passed by the Council. The first declared the embankment a nuisance; the second required the company to construct a culvert, as described, in thirty days, and on their failure so to do, that the culvert be built by the City Council, at the expense of the company. Application was made to the presiding Judge of the Superior Court for a *certiorari*, to review these two resolutions of Council.

Upon hearing the application, the Court certified that there was no controversy as to the abatement of the nuisance, in the mode specified, and that the only question at issue was as to the authority of Council to cast the expense of the culvert upon the company.

The *certiorari* was granted—the Court holding that the Council exceeded their authority in adjudging that the expenses should be paid by the company.

This decision is assigned as error.

LAW and BARTOW, for plaintiffs in error.

MARSH and PEPPER, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] The Mayor and Aldermen of the City of Savannah, on the 9th September, 1850, passed the following resolutions:

1st. *Resolved*, That the Savannah and Ogeechee Canal Com-

pany is guilty of obstructing the drainage of the low lands of the Springfield Plantation, caused by the embankments of said canal.

2d. *Resolved*, That said company be required to commence and finish a culvert fourteen feet wide and two feet six inches deeper than the beds of the present culverts, within the space of thirty days; and that in default of the same, that such a culvert be built by the City Council, at the expense of said company, and that a copy of the above be served on the President of said company.

These resolutions were passed after notice to the company to appear and answer, and after a full hearing. Application being made to Judge Jackson, by the Canal Company, for a *certiorari*, it was granted, with directions to the City Council to stay all further proceedings in the cause, until the further order of the Court. By referring to the petition for the *certiorari*, I perceive that the whole action of the City Council in the matter is excepted to and claimed to be erroneous. The order of the Judge supersedes the whole action. Upon the decision of the Judge, granting the *certiorari*, errors are assigned before this Court. In his written opinion, sent up with the record, he clearly does not decide that the City Council had not the power to abate the nuisance complained of, and he does decide, *only*, that the City Council had no power to adjudge the cost of removing the nuisance, by constructing, themselves, a culvert which would subserve the purpose of draining the Springfield Plantation, against that company; and, in an explanatory statement which he has appended to the bill of exceptions, and which we are to take as part of the bill, and by which we are governed, he expressly says that this is all that he did decide. We can consider no question which the Court below did not decide; and we are to consider only those which he says he did decide. His certificate to the bill, a part of which is his explanatory statement, is conclusive as to the points ruled in the case. We are then to determine whether the presiding Judge erred in ruling that the City Council of Savannah had no power to adjudge the expenses of constructing the culvert, ordered to be constructed in the

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second resolution before quoted, against the Canal Company. To do so, it is necessary to determine what the order or resolution of the Council is, and what is its effect. The Court below calls it a judgment. It is true that, when it was passed, the Council were acting in their judicial capacity. It was passed when the matter of complaint against the Savannah and Ogeechee Canal Company was before them. Still, I apprehend that it neither is nor was by them considered a judgment, upon which process of execution could issue for enforcement. Whilst they were judges in the matter in issue between the city and the company, they were, at the same time, the Mayor and Aldermen of the City of Savannah—the officers of the City of Savannah. They could, at that sitting, and in reference to the same subject matter, act in both capacities. The time when, and the occasion for the order, do not necessarily make it a judgment. They could not have intended it for a judgment, because the ordinance of the city—their own law, under which they were then acting, and without which they could have taken no action—of August, 1850, declares the manner in which the costs of constructing this culvert shall be collected. The manner there pointed out is inconsistent with the idea that this is or was intended to be a judgment. That ordinance provides that, in case of nuisance for the want of sufficient culverts, the party shall be notified to construct them; and upon failure so to do, they shall be provided by the city, and their costs shall be collected from such party, *by warrant of distress, or by an action on the case for damages.* We are to presume that the Council acted in reference to the law. We cannot presume an intention in any tribunal to violate the law. What, then, is it? It may be considered in more lights than one, and either view of it gives it a reasonable intendment and effect. It may be viewed in the light of an instruction to the proper officer of their board, so soon as the culvert was built, to take the legal steps to collect the costs of constructing it—that is, to institute a proceeding, under the law for that purpose, by warrant of distress or by action on the case for damages; or it is simply a declaration that the Council expected the company to pay the cost, which subserved the purpose of a

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notice to them. In either view, it was competent for the Council to pass such an order. In the latter view, it ought to be held as an act kind and considerate towards this company. Suppose, though, that they intended it as a judgment, upon which summary process of enforcement could issue, that intention does not make it so. Their own law would defeat such intention. It is a nullity, by virtue of the ordinance of 1850, which points out the mode in which the costs shall be collected, and which was in force at the time it was passed. To say the least of it, it is harmless. The company are not concluded, as to their liability to pay the costs, by it. The Courts of justice will be open to them whenever, either under this order, or by warrant or by action, the attempt is made to collect the costs. No fear but that they will have their day in Court. Whether they will be liable, in law, to pay it, is a question not made, and upon which we express no opinion. It seems to us that the city authorities have pursued a mild and forbearing course in this whole matter. Having power to abate this nuisance, they could have proceeded summarily to do so, and, without delay, have ordered their Marshal to cut down the embankments of this company. Very properly, they have forbore to do so, and have taken a course which, whilst it fulfils their obligations to the city, is least irritating to the feelings, and least injurious to the property of the defendants in error.

Let the judgment be reversed.

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No. 55.—ALLEN, BALL & Co. plaintiffs in error, vs. THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, defendants in error.

- [1.] The writ of error is an original writ.
- [2.] The object and effect of the writ of error considered.
- [3.] The writ of error is in the nature of a new suit. It lies only to a *final* judgment.
- [4.] Where a cause is carried up, and the judgment of the Superior Court affirmed, it takes effect from the date of the first judgment.
- [5.] Neither by the Common Law, nor the Act organizing the Supreme Court in this State, is a writ of error a *supersedeas* of the execution, unless bond and security is given.
- [6.] Judgments in the Circuit Court, which are affirmed, do not lose any lien or priority, by reason of the proceedings in the Supreme Court.
- [7.] The pendency of a writ of error does not impair or affect the judgment of the Superior Court. It is binding until reversed, and, when affirmed, is binding, *ab initio*.
- [8.] A Statute of the State, declaring of full force all the ordinances of a city or other corporation, "*in operation*" at its date, does not embrace one which has been judicially pronounced by the Superior Court to be *inoperative* before its passage.
- [9.] The phrase, "*in operation*," defined.

Certiorari. Decided by Judge H. R. JACKSON, December 20th, 1850.

On 11th November, 1842, the Mayor and Aldermen of the City of Savannah passed an ordinance, imposing a tax upon the gross commissions or income received from sales of goods, professional pursuits, &c. On the 22d November, 1849, another ordinance was passed, "to reduce the taxes of the City of Savannah," which, among other things, reduced "the tax on income 25 per cent." On the 9th of December, 1849, the General Assembly passed an Act which, among other things, provides, "That all and singular the ordinances of said corporation (of Savannah) heretofore passed, and *now in operation*, for the laying or collecting of any tax or assessment, be and they are hereby adopted and confirmed, and declared of full force."

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By a declaratory ordinance, passed 13th May, 1850, the income tax was directed to be collected from the date of the passage of the Act, 9th December, 1849.

On the 9th day of June, 1849, in a cause pending between the Mayor, &c. of Savannah and Charles Hartridge, Judge *Fleming*, then presiding in the Superior Court of Chatham County declared the ordinance of 11th November, 1842, illegal and void; which decision, on appeal to the Supreme Court, was affirmed at January Term, 1850: See 8 Ga. Reps. 23.

Allen, Ball & Co. having refused to pay their income tax, assessed as prescribed in the declaratory ordinance of May, 1850, an execution was issued therefor. To this *fi. fa.* an affidavit of illegality was filed, on the grounds, among others, that the City Council had no power to pass the ordinance assessing a tax on income; that the ordinance of November, 1842, had been declared illegal and void, before the passage of the Act of December, 1849, and was consequently not "now (then) in operation;" and that the declaratory ordinance of May, 1850, was retrospective and void.

The City Council having overruled the grounds taken, a writ of *certiorari* was applied for to Judge *Jackson*, presiding in Superior Court. On argument had, the writ was refused.

And to this decision exceptions were filed, on which error has been assigned.

LAW and BARTOW, for plaintiffs in error.

LLOYD & OWENS and R. H. GRIFFIN, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

By an ordinance passed the 11th of November, 1842, the Mayor and Aldermen of Savannah imposed a tax of two and a half per cent. on gross income; and on the 22d of November, 1849, they passed another ordinance, reducing the tax on income twenty-five per cent. On the 13th day of May, 1850, the Mayor and Aldermen passed another ordinance, entitled "An ordinance

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declaratory of existing tax ordinances, which is as follows: Whereas, it is understood that doubts exist as to the precise day from which returns are to be made under the ordinance passed the 11th day of November, 1842, imposing a tax upon all gross income derived from commissions, (whether ordinary or guaranty commissions,) charged on purchases or sales of any articles whatever, or procuring and collecting freights, or receiving and forwarding goods; on all money negotiations; on the purchase or sale of stocks, or other evidences of debt or commissions received as executor or executrix, or administrator or administratrix, and also upon the profit or income arising from the pursuit of any faculty, profession or calling, (the clergy and schoolmasters excepted;) and, whereas, the Legislature at its last session, by an Act duly passed and approved, adopted, confirmed and declared of full force, all and singular the ordinances of this corporation heretofore passed and then in operation, for laying and collecting any tax or assessment—

“Be it therefore ordained by the Mayor and Aldermen of the City of Savannah and the hamlets thereof, in Council assembled, and it is hereby ordained by the authority of the same, that the City Treasurer be, and he is hereby ordered and directed to receive; and all persons liable to said tax are required to make returns under the ordinance aforesaid, and those amendatory thereof, from the day of the passing and approving of the Act aforesaid.

“And be it further ordained, that the City Treasurer issue executions against all defaulters, according to the tax ordinances of the city.”

By order of this last ordinance, Allen, Ball & Co. returned commissions on purchases, sales, freight, and other negotiations, from the 8th December, 1849, to the 30th April, 1850, inclusive, \$6,381, tax \$119 71; and having failed to pay this tax, the Mayor and Aldermen issued an execution for the collection of the same, under which a levy was made, when Allen, Ball & Co. filed their affidavit of illegality, setting forth, among other things, the following grounds:

1st. Because the said execution was issued upon assessment

made upon the return of deponents of their gross income, derived from purchases, sales, freight, negotiations and general commercial business, between the 8th December, 1849, and 30th April, 1850, which said return was made by an order of the Mayor and Aldermen of the City of Savannah and the hamlets thereof, which said order was illegal.

2d. Because the corporation of the City of Savannah is not authorized by any law of this State, to levy an assessment upon income, and because the said execution has issued to collect a tax or assessment upon the income of deponents, derived from their personal labor.

3d. Because the ordinances and resolutions, passed by the Mayor and Aldermen of the City of Savannah and the hamlets thereof, under which said assessment has been made and execution issued, are not in conformity with the Act of 24th of December, 1845, nor the tax law of 1804, nor any other law of this State, nor in conformity with the powers conferred upon the corporation of the City of Savannah by the Act of 1849, or by any other Act of the Legislature of the State of Georgia, but, on the contrary, is in violation of said laws.

4th. Because the ordinances of the City of Savannah, which assess a tax upon income, and under which said execution issued and is proceeding, have been declared to be invalid and void by the highest judicial Courts in this State, and because said execution has been issued under said ordinances thus judicially declared to be inoperative.

5th. Because the ordinance of the Mayor and Aldermen of the City of Savannah and the hamlets thereof, passed the 13th of May, 1850, entitled "An Ordinance declaratory of existing Tax Ordinances," and by virtue of which said assessment was made, and the said execution issued, was without authority of law, and levied a retrospective tax upon income which had been received and expended prior to its enactment.

This affidavit of illegality being returned to the Mayor and Aldermen on the 29th August, 1850, the same was overruled by them, and the execution and levy ordered to proceed. Whereupon, Allen, Ball & Co. by their counsel, excepted to the said

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order and decision of the Mayor and Aldermen, upon the affidavit of illegality, which exceptions were overruled. Allen, Ball & Co. then presented their petition to the Judge of the Superior Court, in and for the Eastern District, in terms of the law, praying for the writ of *certiorari* upon the specifications of errors complained of in the said decision and order of the Mayor and Aldermen, and, upon the said petition, the Judge made an order that the Mayor and Aldermen should show cause why the prayer of the petitioners should not be granted, and the writ of *certiorari* issued. Upon the 20th December, 1850, the writ was made returnable, and cause shown. Whereupon, the Judge refused to grant the same, and maintained that the 4th section of the Act of the Legislature, approved on the 8th December, 1849, in reference to the City of Savannah, and providing "that all and singular the ordinances of said corporation heretofore passed, *and now in operation*, for the laying and collecting of any tax or assessment, be, and the same are hereby adopted and confirmed, and declared of full force," made the ordinance of 1842, under which this tax was imposed, valid and legal, notwithstanding the same had been pronounced null and void by his predecessor of the Eastern Circuit, on the 9th of June, 1849, which judgment was affirmed by the Supreme Court, in the Term of January, 1850. To which decision, Allen, Ball & Co. by their counsel, Law and Bartow, Charlton & Ward, excepted, and now allege the following grounds of error :

1st. Because the Judge decided that the execution issued against the property of Allen, Ball & Co. for the recovery of the tax assessed upon their income, as heretofore set out, was properly issued, and by authority of law.

2d. Because the Judge decided that the Act of the General Assembly of the State of Georgia, passed the 8th day of December, 1849, gave validity to the ordinance of the Mayor and Aldermen of the City of Savannah, passed the 11th day of November, 1842, entitled "An Ordinance amendatory of, and in addition to the Tax Ordinance of the City of Savannah, for raising supplies for the support of a Watch, and other purposes."

3d. Because the Judge decided that the said ordinance, before recited by its title, was *in operation* at the time of the passing of the Act of the General Assembly, of the 8th day of December, 1849, when, in fact, the said ordinance, so far as it related to the tax therein imposed upon income, had been declared to be inoperative and void by the Judge of the Superior Court of the Eastern District, in the Term of May, 1849, which judgment was affirmed by the Supreme Court, in the Term of January, 1850.

4th. Because the Judge erred in the construction he gave to the 4th section of the Act passed by the General Assembly, on the 8th of December, 1849, which enacted "that all, and singular the ordinances of said corporation, (of Savannah,) heretofore passed, and now in operation for the laying and collecting of tax or assessment, be, and they are hereby adopted and confirmed, and declared of full force," by applying the said section to the tax ordinance referred to, when the same was not in operation in law or in fact.

5th. Because the Judge erred in deciding "that the only ordinances of the City of Savannah, of the character referred to, which were not either obsolete or repealed at the date of the Act, were the ordinances of the 11th of November, 1842, and of the 22d of November, 1849, the latter being a re-enactment of the former, with a reduction of the rates of taxation," when, in fact, there were other ordinances "of the character referred to," and the ordinance of the 22d of November, 1849, was not a re-enactment of the ordinance of the 11th of November, 1842, but only an amendment thereto.

6th. Because the Judge erred in deciding "that a legislative Act, when passed directly by the Legislature, or indirectly by their authority, must be considered as in operation, until repealed or pronounced unconstitutional or illegal by the Supreme Court of the State." Whereas, the ordinance in question had been declared to be inoperative by a Court of superior and competent jurisdiction, in a case in which its validity had been directly in issue, which judgment remained of full force, until reversed by a supreme tribunal, or overruled by its own authority, and which

judgment was subsequently affirmed by the Supreme Court, and was, therefore, of force and binding from the time when it was made by the said Superior Court.

7th. Because the Judge erred in his construction of the Act of the Legislature of December 9th, 1849, by calling, in aid of said construction, extrinsic facts and circumstances not mentioned or alluded to in the Act itself, and by explaining the legislative intent outside of the terms of the Act.

Judge Jackson deemed it unnecessary for him to consider whether the last ordinance, of May, 1850, could or could not retroact, so as to authorize the issuing and levy of this tax execution; for the reason, I suppose, that he viewed this as a proceeding under the previous ordinances of 1842 and 1849. Such it purported to be, and undoubtedly is. Indeed, this last ordinance did not profess to *levy* a tax, but was *directory*, merely, as to the mode of giving in and receiving the income tax, under existing ordinances. And the whole question, in this case, turns upon a single point: Did the fourth section of the Act of 1849 give validity to the income ordinances then upon the statute book of the corporation of the City of Savannah? And the answer to this inquiry depends upon the settlement of this principle. Does a Statute of the State, giving vitality to all the tax ordinances of a city "*in operation*," apply to one which has been judicially declared by the *Superior* Court to be *inoperative* before its passage? The ordinance of 1842, having been decided by Judge Fleming, at the May Term, 1849, of Chatham Superior Court *inoperative*, which judgment was affirmed by the Supreme Court, upon writ of error, the January ensuing, was this ordinance embraced by the Act of the Assembly of the 8th December, 1849, "adopting, enforcing and declaring of full force, all and singular the ordinances of the corporation of Savannah then *in operation*?" To determine this point properly, it becomes necessary to ascertain the effect and operation of a writ of error, in relation to the judgment rendered in the Circuit Court.

[1.] The writ of error is an original writ. In England it is issued out of a Court of competent jurisdiction, directed to the

Judges of a Court of record, in which *final* judgment has been given, and commanding them, in some cases, themselves to examine the record; in others, to send it to another Court of appellate jurisdiction, therein named, to be examined, in order that some alleged error in the proceedings may be corrected. *Steph. Pl.* 138. 1 *Cowen*, 18, 19. 3 *Hammond*, 354.

[2.] The object of the writ of error is to review and correct an error of the law, which is not amendable at Common Law, or cured by any of the Statute of jeofails. *Tidd's Pr.* ch. 43. *Graham's Pr. B.* 4, c. 1 *Bac. Abr. Error in pr.* 1 *Vern.* 169. *Yelv.* 76. 1 *Salk.* 322. 2 *Saund.* 46. n. 6. *Ibid.*, 101, n. 1. 3 *Bl. Com.* 405. *Serg. Const. Law*, ch. 5.

[3.] It is considered a new suit, and it is less an action between the original parties than a question between the judgment and the law. It is not the action which is to be judged, but the judgment. 7 *Durnf. & East*, 337. 6 *Port. Rep.* 9. 3 *Story's Const. Law.* §1721. 2 *Sand.* 101, f.

Writs of error are, upon *final*, as contrasted with *interlocutory* judgments, meaning, by the words *final* judgment, one which determines the particular cause. 1 *Wend.* 35. 4 *Cowen*, 82. 6 *Johns.* 337. 2 *Mass.* 142. 3 *Binney*, 531. 9 *Pierce*, 606. 3 *T. R.* 78. 2 *Salk.* 504. 4 *Raele*, 355. 2 *Peters*, 464, 465. 5 *Conn. Rep.* 356, 357. *Tillinghast & Yates' Treatise on Error and Appeals*, *passim*.

[4.] The inference to be drawn from these authorities is, that the judgment of the Court below is considered, at Common Law, a *final judgment*, and the object of the new proceeding by writ of error, is to test this judgment by the law, the result being, on such an examination, either its affirmance or reversal.

[5.] By the Act of 1845, as well as by the Common Law, a writ of error is no *supersedeas* of execution, unless bond and security is given. The first judgment is treated, to all intents and purposes, as a final judgment. Indeed, if it be sustained, none other is awarded.

[6.] And the Statute expressly provides that judgment in the Court below, if affirmed, shall not lose any lien or priority by

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reason of the proceedings in the Court above. *Pamphlet Laws*, 1845, p. 21.

[7.] Our conclusion, therefore, is that the pendency of the writ of error did not affect the judgment of the Superior Court declaring void the ordinance of 1842, imposing a tax upon income. It was binding until reversed, and being affirmed, it was binding, *ab initio*. The only effect of the judgment of the Supreme Court, in January, 1850, was the judicial ascertainment of the fact, from an examination of the record, that the ordinance of November, 1842, was always a nullity, so far as income tax was concerned, the corporation possessing no authority to impose it, and of course was inoperative, on the 8th of December, 1849, when the Act of the Legislature was passed.

[8.] Had the judgment of affirmance of the Supreme Court been pronounced *prior* to the legislative enactment, there would be no doubt or controversy. The effect is just the same, whether made in October, before the Act was passed, or in January, afterwards. It relates back, and takes effect from the date of the first judgment in the spring of 1849.

[9.] What is the meaning of the phrase, "*in operation*," used by the Assembly? According to Webster, and the best lexicographers, *operation* is defined to be the exertion of power, physical, mechanical or moral—action, as of an army or fleet—movement of machinery. Can an ordinance, which had been pronounced a nullity by a Court of competent jurisdiction, six months previously, and the proceedings under it set aside as illegal, be said to be "*in operation*," viz: working for the corporation? Instead of being in progress, its motion was completely arrested, *never to be again revived*.

What purpose those who framed this Act may have designed to subserve, we do not pretend to know. Gathering the intention of the Legislature from the language of the Statute, we are of the opinion that the ordinance of 11th of November, 1842, was not "*in operation*" at the time of the passing of the Act of December 8th, 1849, and was, therefore, not embraced by the terms of the 4th section of that Statute.

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Whether the 3d section of this Act confers power to impose an income tax, it is unnecessary to decide. It vests the Mayor and Aldermen "with full power and authority to make such assessments, and levy such taxes on the inhabitants of Savannah, or those who have taxable property within the same, for the safety, benefit, convenience and advantage of the city, as shall appear to them expedient." All I can say is, that this grant is exceedingly broad.

Let the judgment be reversed.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT TALBOTTON,
JANUARY TERM, 1851.

Present—JOSEPH H. LUMPKIN,
HIRAM WARNER,
EUGENIUS A. NISBET, } Judges.

No. 56.—EDWARD BROOKS, plaintiff in error, *vs.* JOHN C. ASH-
BURN, defendant in error.

- [1.] In an action of trespass for killing a slave, the defendant plead the general issue, and at the trial, gave in evidence, by way of justification, that he was acting as a patrolman, under the 44th section of the Act of 1770: *Held*, that the defendant was not sued for putting in execution any of the powers contained in the Act of 1770, and that so much of that Act as is *repugnant* to the Judiciary Act of 1799, which requires the defendant plainly, fully and distinctly to set forth his defence in writing, is repealed by the latter Act.
- [2.] Where a witness who resides in the County in which the suit is pending, and was in attendance under a subpoena on the first day of the Court, and on that day his testimony was taken by commission, who, on the day of the trial, was unable to attend the Court, from bodily *indisposition*: *Held*, that the testimony could not be read as that of a witness who was unable to attend the Court from age or bodily *infirmit*y, as contemplated by the Act of 1838.

[3.] Where an immediate act is done by the co-operation, or the *joint* act of two or more persons, they are all trespassers, and may be sued jointly or severally, and any one of them is liable for the injury done by all. To render one man liable, in trespass, for the acts of others, it must appear either that they acted in *concert*, or that the act of the party sought to be charged, ordinarily and naturally produced the acts of the others.

Trespass, in Macon Superior Court. Tried before Judge WARREN, September Term, 1850.

This was an action of trespass, brought by Edward Brooks against John C. Ashburn, for the value of a negro man. The plaintiff's case showed that Ashburn and one Drawhorn went to the house of one Lockett, on the Sabbath day, in search of a runaway negro of Drawhorn's. Seeing some negroes collected, they approached them, when the negroes ran in different directions. Ashburn pursued one, and Drawhorn another. Drawhorn struck the negro of plaintiff, and killed him. The value of the negro \$800.

Plaintiff offered in evidence the interrogatories and answers of John McKenzie, an aged and infirm person, who had been subpœnaed, and was in attendance on the first day of the term. The commission was executed on that day. On the day of the trial, he was "unable to attend, from bodily indisposition." The witness was a regular minister of the gospel, and had attended his usual appointments previous to this last sickness.

The Court rejected the depositions, offering plaintiff a continuance. This decision was excepted to, and is assigned for error.

Defendant proved that he was commissioned as a Captain of Patrols, in the first of the year, 1846, (in which year the negro was killed,) which commission was to continue three months, or until the Captain resigned. The negro was killed within his patrol district.

To all of this testimony plaintiff objected, on the ground that defendant had pleaded only the general issue, and had not set forth in his answer the defence now relied on. The Court

overruled the objection, and this decision was excepted to, and is now assigned as error.

The Court charged the Jury as follows :

“ If the evidence convinces you that Drawhorn and the defendant went voluntarily, and in concert, into the enclosure of Mr. Lockett, to rout slaves there seen by them, and, in the pursuit of this purpose, Drawhorn or Ashburn killed the negro, each and both are civilly liable to any party injured, for the injury done by either, and the value of the slave is the measure of damages.

“ But if the entering the enclosure of Lockett by defendant and Drawhorn was not voluntary, but in the execution of patrol duty by Ashburn, the act of entering the enclosure was not a trespass, but lawful ; and, in the execution of this lawful act, any one of the parties who acts in excess of his duty, will be alone liable ; or, at most, any such as may act in excess of their duty would be liable for damages arising from the excessive act. So that if it was in discharge of their duty, as patrolmen, they entered the enclosure, and Drawhorn went in pursuit in one direction, and the defendant in another direction, and Drawhorn killed the slave without excess of action by Ashburn, or by his direction, then Ashburn is not civilly liable, and plaintiff must look alone to the party killing his slave for the damages he has received.

“ The Jury will discover from this, that much depends upon the fact, whether the defendant was acting at the time, *bona fide*, as a patrolman, in the agency he had in the matter under consideration. If, at the time, he was acting, *bona fide*, as a patrolman, and was not present and countenancing the excessive act of producing death, then he is not liable to plaintiff for damages. But, on the contrary, if the defendant and Drawhorn were not acting as patrolmen, and this defence is an afterthought, then each is liable for the act of the other, and Ashburn is liable for the act of Drawhorn, and (if Drawhorn killed the negro) liable for the value of the slave. The Jury will judge of the evidence, and apply it to the principles of law laid down, and find, ac-



according to the conviction which the evidence produces on your minds."

To all of which instructions, or so much as tended to excuse the defendant from liability as a co-trespasser, on the ground of being a patrolman, plaintiff excepted, and has assigned error thereon.

These several grounds of error were argued before the Supreme Court.

S. MILLER and GEO. R. HUNTER, for plaintiff in error.

L. S. SMITH, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The first ground of error taken in the record to the judgment of the Court below, which we shall consider, is the admission of the evidence offered by the defendant, as a justification under the Patrol Laws of this State. This defence was not specially set forth in the defendant's answer, he having only plead the *general issue* to the plaintiff's action. The question is, whether this evidence of *justification* was admissible, under the plea of the *general issue*?

The defendant relies on the 44th section of the Act of 1770, relating to slaves, patrols, and free persons of color. *Prince*, 786. That section of the Act declares, that "if any person shall be, at any time, sued for putting in execution any of the powers contained in this Act, such person shall and may plead the general issue, and give the special matter and this Act in evidence," &c.

This action is a common action of trespass, brought by the plaintiff against the defendant. The defendant is not sued for putting in execution any of the *powers contained in the Act of 1770*. It is true, he offered evidence, on the trial, to justify himself, under the provisions of that Act; but such evidence was an independent matter of defence for him, which he ought specially to

have set forth in his answer, as provided by the 9th section of the Judiciary Act of 1799. *Prince*, 421.

The Judiciary Act of 1799 regulates the pleadings in all civil suits, cognizable in the Superior and Inferior Courts, on the Common Law side of said Courts, respectively. *Prince*, 420. The plaintiff's action was a *civil suit*, to recover damages for the injury done to his property; and if the 44th section of the Act of 1770 shall be considered as *repugnant* to the Act of 1799, so far as the pleadings of the defendant are concerned, then the Act of 1799 repeals the Act of 1770 to that extent. The same reason exists in this case why the defendant should "plainly, fully and distinctly set forth the cause of his defence," to prevent surprise at the trial, on the part of the plaintiff, as in any other *civil* suit which may be instituted in the Court. *Johnson et al. vs. Ballingall*, 1 *Kelly*, 68.

This ground of error was well taken, and must be sustained.

[2.] The next ground of error assigned upon the record is, that the Court rejected the answers of John McKenzie, whose testimony had been taken by commission, under the provisions of the Act of 1838. That Act provides, among other things, that any witness whom the plaintiff or defendant may deem material in any cause pending in any of the Courts of Law and Equity in this State, who, from *age or other bodily infirmity*, may be unable to attend Court, it shall and may be lawful to examine such witness by commission, in the manner prescribed by law, in case where witnesses reside out of the County. *Hotchkiss*, 585. The facts disclosed by the record do not, in our judgment, bring this witness within that provision of the Act of 1838, which relates to those persons who, from *age or other bodily infirmity*, are unable to attend the Court. This witness resided in the County, was subpoenaed and attended the Court, in person, on the first day of the term, on which day his answers were taken; but on the day of the trial, the record states, he was unable to attend, from *bodily indisposition*, not from *age or bodily infirmity*. It also appears that the witness was a minister of the gospel, and attended his usual appointments prior to this last sickness. Taking the record as true, this witness was attending the Court un-

der a subpoena, like any other witness who lived in the County in which the suit was pending, but was taken sick during the term of the Court, and was not able to be present on the day of trial on that account.

The plaintiff was undoubtedly entitled to have had a continuance of his cause, which the Court offered to grant him, but the testimony of the witness, taken by commission, under the peculiar facts of this case, we think, was properly rejected by the Court. It is always desirable to have the witness personally present in Court, when it can be done, and we are unwilling to create *exceptions* in favor of the introduction of testimony taken by commission, beyond those which the Legislature have thought proper to create, and the party offering such testimony must clearly bring it within the provisions of the Statutes which authorize it. See *Craft vs. Jackson*, 4 Geo. Rep. 363.

[3.] The third and last objection taken to the judgment of the Court below, is its charge to the Jury.

Ashburn was alone sued in this action, and the effort of the plaintiff, on the trial, was to make him a *joint* trespasser with Drawhorn, who killed the slave. Ashburn justified as a patrolman. It appears some negroes were routed in the yard of Lockett; Ashburn pursued one in one direction, and Drawhorn pursued the plaintiff's negro in another direction, and committed the trespass.

Where an immediate act is done, by the co-operation or the *joint* act of two or more persons, they are all trespassers, and may be sued jointly or severally, and any one of them is liable for the injury done by all. To render one man liable, in trespass, for the acts of others, it must appear either that they acted in *concert*, or that the act of the party sought to be charged, ordinarily and *naturally* produced the acts of the others. *Gaile vs. Swan*, 19 John. Rep. 382. If Ashburn, as a patrolman, entered the yard of Lockett, in company with Drawhorn, to disperse the slaves, and did not exceed his authority by any act done by him, he is not responsible for the excess of authority on the part of Drawhorn, unless he acted in *concert* with Drawhorn, either directly or indirectly, in the commission of the acts which

constitute such excess of authority. Did the act of Ashburn entering the enclosure where the negroes were, as a patrolman, and pursuing one negro, which was not injured, in one direction, *naturally* produce the act of trespass committed by Drawhorn upon the plaintiff's negro, who was pursued in a different direction? In short, did Ashburn, either directly or indirectly, act in concert with or contribute to the act alleged as an excess of authority on the part of Drawhorn? If he did, then, in the eye of the law, he is a co-trespasser; if he did not, then he is not liable to the plaintiff as such.

We are of the opinion that the Court gave the law applicable to the facts of this case, in charge to the Jury, substantially correct, and find no ground for a reversal of the judgment in that assignment of error. The judgment of the Court below must, however, be reversed, on the first ground considered, and it is so adjudged.

No. 57.—HENRY S. HOADLEY, plaintiff in error, *vs.* LUKE BLISS, defendant.

[1.] Letters from the indorser to the holder of a note, barred by the Statute, which bear date anterior to six years preceding the institution of suit: *Held*, to be inadmissible to take the case out of the Statute.

[2.] A note made payable *at either of the Banks in Macon*: *Held*, to be within the proviso to the Act of 1826, which dispenses with demand and notice to charge an indorser.

[3.] An indorser can waive demand and notice before the maturity of the note only; after its maturity, he can waive proof of demand and notice.

Assumpit, &c. in Early Superior Court. Tried before Judge WARREN, October Term, 1850.

Hoadley vs. Bliss.

This was an action by Hoadly against Bliss, as the indorser upon the following note :

\$1660 50.

December 25, 1837.

On the first day of June next, we promise to pay to the order of Luke Bliss, sixteen hundred and sixty dollars and fifty cents, at either Bank in Macon, for value received.

(Signed,) CRAFT & LEWIS.

(Indorsed,) LUKE BLISS.

Credits.—February 11, 1841, \$100; March 27, 1841, \$100; April 28, 1841, \$100; June 8, 1841, \$84 12.

The suit was commenced on the 9th April, 1847, and there was in the petition a count upon a new promise alleged to have been made on 20th April, 1841.

On the trial, the following letter was read in evidence.

FORT GAINES, April 20, 1841.

“*Mr. H. S. Hoadly* :

Dear Sir—I enclose you herewith one hundred dollars, the best funds I could get. We don't get a dollar of Augusta bank bills in this quarter. The bearer of this, Dr. Gardner, will return in a short time. You could acknowledge receipt by him. Times are extraordinary hard on Merchants. I wish you could excuse me from paying anything more at present.

Truly yours,

LUKE BLISS.”

Three other letters were offered in evidence, dated, respectively, 16th January, 1841, 3d February, 1841, and 21st March, 1841, the first of which prayed indulgence upon the claim now in suit, and the two latter enclosed each the sum of \$100.

The Court rejected the letters as evidence, on the ground that they bore date anterior to six years immediately preceding the commencement of the suit. This decision was excepted to by counsel for plaintiff.

The Court, among other things, charged the Jury, that to hold the defendant liable, as indorser upon the note, it was neces-

sary for the plaintiff to prove demand and refusal of the maker, and notice to the defendant; that the said note fell within the proviso to the Act of 26th December, 1826, "to define the liability of indorsers of promissory notes," &c. and that if plaintiff failed to prove notice of the demand and refusal, the defendant was discharged.

To which charge, plaintiff excepted.

On these two exceptions, error was assigned.

DOWNING, for plaintiff in error.

McDOUGALD and CARUTHERS, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The letters were rightfully rejected. They could prove nothing of themselves, bearing date anterior to the six years preceding the suit. If they contain evidence of a new promise to pay the note, that promise is barred. There is no evidence to connect them with the payments made within six years, and cannot be, therefore, any part of the *res gestæ* of those payments.

[2.] We also think that this note is within the *proviso* to the Act of 1826. It excepts from the operation of the Act, which declares demand and notice to be unnecessary to charge indorsers, "notes which shall be given for the purpose of negotiation, or intended to be negotiated at any chartered bank, or which may be deposited in any chartered bank for collection." *Prince*, 462. This note is made payable at *either of the banks in Macon*. The undertaking of the holder is, that he will have the note at one of those banks at maturity, and of the maker, that he will there pay it. The presentation of a note at bank for payment, and the payment of it there, would be a collection of it at bank. If the note be presented at bank by the holder, or any other person for him for payment at maturity, it is a deposit there for collection. When, therefore, the parties agree in the face of the note, that it shall be payable at bank, such agreement affords conclusive evidence that they intend it to be deposited there for collection;

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and we are obliged to infer that it was so agreed for the very purpose of bringing it within the *proviso* of the Statute; that is, that it was the purpose and intent of the parties to this paper, that the indorser should have notice. Again, it is fairly to be presumed, from the fact that this note is made payable at bank, that the parties intended it to be negotiated at bank. This is the form in which notes are usually written when money is to be raised upon them at bank. It is not an indispensable form, but it is the usage to make them payable at the bank where they are to be discounted. It is convenient to have them so payable. The understanding of mercantile men and of the law merchant would be, I think, that where a note is thus drawn, the intention of the parties is, not that it necessarily must be, but that it may be negotiated—that is, sold—transferred to the bank.

I know not that anything more need be said on this assignment.

[3.] The presiding Judge held, that ~~the~~ indorser could waive demand and notice *before the note fell due*, and it is excepted that this was an error. He could waive demand and notice at no other time. It is true that he may, *after* it is due, waive his right to except to his liability, that is, waive proof of demand and notice, and the presiding Judge held nothing to the contrary of this.

Let the judgment be affirmed.

No. 58.—HARDY DURHAM, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

[1.] There is no restraint on the power of the State's Attorney to enter a *relle prosequi* on any bill of indictment, with the concurrence of the Court, provided the case has not been submitted to the Jury.

[2.] The 18th section of the XIV. division of the Penal Code, allowing any person against whom a true bill of indictment is found for an offence not affecting life, to place on the minutes of the Court a demand for a trial

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either at the term when the indictment is found, or at the next succeeding term thereafter, and entitling the accused to be absolutely discharged and acquitted of the offence, if such person is not tried at the term when the demand is made, or at the next succeeding term thereafter: *Provided*, that at both terms there were Juries impaneled and qualified to try the prisoner—is imperative in its language, and admits of no exceptions. Trial or acquittal are the only alternatives.

Indictment for perjury, in Dooly Superior Court. Decision by Judge WARREN, November Term, 1850.

At the May Term, 1850, of Dooly Superior Court, Hardy Durham was indicted for perjury. The perjury assigned, was upon an affidavit to a bill filed for the review of a former decree, rendered in Dooly Superior Court. At that term, the defendant demanded a trial, in terms of the provision made in the Penal Code, and placed his demand upon the minutes. At the November Term, 1850, when the case was called in its order, the defendant announced himself ready for trial. Whereupon, the Solicitor General desired the Court to enter a *nolle prosequi*, stating that he was induced so to do, for the reason that the indictment was fatally defective. The counsel for defendant then moved the Court for an order of discharge from the offence stated in the indictment. The Court refused the motion, and allowed the *nol. pros.* to be entered. Which decision was excepted to, and is assigned as error.

Afterwards, and at the same term of the Court, a new bill of indictment was preferred and found against the defendant for perjury, assigned upon the same affidavit, “and embracing substantially the same offence.” When the same was called in its order for trial, the defendant announced himself ready. The counsel for the State then moved a continuance. Whereupon, defendant, by his counsel, moved for an order of discharge and acquittal—the case being finally called, and a Jury being in attendance, impaneled and qualified to try the case. Which order was refused by the Court—Judge Warren holding that the first indictment was so defective that an acquittal would furnish no bar to a second indictment for the same offence. The motion by the

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State for a continuance was then granted. These decisions are assigned as error.

I. L. HARRIS and S. T. BAILEY, for plaintiff in error.

B. HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

A true bill for perjury having been found against Hardy Durham, in the Superior Court of Dooly County, the indictment was called in its order, at the November Term, 1850, of said Court, and the defendant was required to announce whether or not he was ready for his trial. He answered that he was ready. Whereupon, the Solicitor General moved to enter a *nolle prosequi* in the case, for the purpose, as he alleged, of preferring another and more perfect bill against the accused. This proceeding was resisted on the part of Durham, on the ground that at the previous May Term of the Court, when the indictment was found, he had placed upon the minutes of the Court a demand for his trial, in terms of the Penal Code; and that not having been tried then, he was entitled to be tried now, or discharged from the offence. The Court allowed the *nolle prosequi* to be entered, but refused to discharge the prisoner. A new bill was preferred and found for the same offence as that specified in the first indictment; which being called in its order on the criminal docket, and the defendant being again required to say whether or not he was ready for his trial, answered, as before, that he was ready. Whereupon, the Solicitor General applied for a continuance of the cause, on the part of the State, which was opposed by the accused, who still insisted that, under the law, it was his right to be tried or acquitted at that term of the Court. The Court granted the continuance, but refused the application for the discharge of the defendant; and to reverse these several rulings, this writ of error is brought.

The case rests entirely upon the construction to be put upon the 18th section of the XIV. division of the Penal Code, which

is in these words : " Any person against whom a true bill of indictment is found, for an offence not affecting his or her life, may demand a trial at the term when the indictment is found, or at the next succeeding term thereafter ; which demand shall be placed upon the minutes of the Court, and if such person shall not be tried at the term when the demand shall be made, or at the next succeeding term thereafter, *provided*, that at both terms there were Juries impaneled and qualified to try such prisoner, then he or she shall be absolutely discharged and acquitted of the offence charged in the indictment." *Prince*, 661.

[1.] The view we take of the clause in this Code is this : Notwithstanding the demand for a trial made by the defendant, and put upon the minutes, it is the right of the State to enter a *nolle prosequi* upon the first or any subsequent bill or bills of indictment that may be found against the defendant for the same offence, either for defects in the pleadings, want of proof or any other cause, if the case has not been submitted to the Jury.

[2.] But we are clear that the accused must be tried at the term when the demand is made, or at the next succeeding term thereafter : *Provided*, that at both of these terms there were Juries impaneled and qualified to try the prisoner, or in default thereof, he *shall be* absolutely discharged and acquitted of the offence with which he stands charged. The Statute is imperative, and it means this, or it means nothing. It was wisely and humanely framed to carry into effect that provision of the Constitution which declares, that " in all criminal prosecutions, the accused shall enjoy the right to a *speedy* and public trial." *Prince*, 900. And this construction imposes no great burthen upon the State. She has at her command ample means of collecting testimony and preparing for trial ; she can recognize witnesses to appear and testify ; she can coerce their personal attendance from all parts of the State, and provision is made to defray their expenses ; she cannot be taken by surprise, as six months previous notice has to be given that a trial will be claimed. If, under such circumstances, she is not ready, the Legislature, to remedy the evil under the English practice, of suffering the Crown to delay the prosecution until it suited its purposes to ter-

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minate it, has interposed this statutory bar or limitation. It is one of the great safeguards thrown around the citizen to protect him from unreasonable and vexatious procrastination and harrassment.

The first application made by the defendant for his discharge, being immediately consequent upon the discontinuance of the first indictment, and during the progress of the Court, we ~~held~~ was premature, and was, therefore, properly rejected. But the last application having been made after the second indictment was called in its order on the criminal docket, and continued, we have a right to assume, what was not disputed in the argument, that it was the only opportunity left to the State to bring this prosecution to a close, and that having failed or refused to do so, the accused was then in order to move for his discharge from the offence, and that it was error in the Court to deny it, either on account of the insufficiency of the antecedent indictment, or for any other cause. The Act makes no exceptions—none are admissible by the Courts.

Judgment reversed.

No. 59.—JAMES HARRISON and others, plaintiffs in error, *vs.*
NORMAN B. THOMPSON, defendant in error.

[1.] Where a Sheriff seized and sold the property of a defendant for an amount larger than the sum due on the execution, and returned, that the proceeds of the sale were taken for *costs*, without specifying what costs: *Held*, that such a return, by the Sheriff, was neither legal nor proper; that it was his duty to distinctly state in his returns, the particular items of costs for which the money, arising from the sale of the defendants property, was appropriated.

[2.] When the Court charges the Jury on an assumed state of facts, not proved before the Jury, it is erroneous.

Motion, in Sumter Superior Court. Decided by Judge WARREN, November Term, 1850.

This was a motion to set aside and have satisfaction entered on a *fi. fa.* in favor of defendant in error against plaintiffs in error, for \$74, principal, and \$4 75, interest, on the ground that the entries on the paper itself, unless explained, showed the same to be paid off. Those entries were as follows:

“Levied the within *fi. fa.* on lot No. 167, the west half of lot No. 86, in the 26th district; also, lot No. 92, in the 27th district; all levied on as the property of James Harrison, March 29, 1842.

E. J. COTTLE, Sheriff.”

“The above levy was sold the sixth of September, for fifty-six dollars and fifty cents, and was taken for costs on this and other *fi. fas.* September, 1842.

E. J. COTTLE, Sheriff.

“Levied the within *fi. fa.* on one wagon and mule, and three head of horses, and fifty head of stock cattle, as the property of James Harrison, pointed out by defendant, September 27, 1842.

“E. J. COTTLE, Sheriff.

“The above levy was sold on the first of November, for one hundred and six dollars, and taken for costs, November 2, 1842.

“E. J. COTTLE, Sheriff.”

The Court overruled the motion, holding the returns to be legal and proper until defendant disproved them. This is the first error assigned.

An issue being then tendered and joined, the defendant introduced two witnesses, one of whom swore that he lived near the Sheriff at the time the last levy was made, and never saw any of the property in the possession of the Sheriff, or on or about his premises; and the other swore that he was present at the sale, and that one of the defendants brought the property to the place of sale, and carried it away. There was no other evidence introduced.

The Court charged, “that the return of the Sheriff was legal

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and proper, and that unless the defendants disproved the return that costs were due, as claimed by the Sheriff, for the keeping of said cattle, &c. that the Jury must find for the plaintiff, and that he was equally entitled to the costs, whether he kept the cattle himself or procured an agent to keep them for him."

To which charge defendants excepted; on the ground that it was founded on an assumed statement of facts, there being no proof as to any agency. And this is the second error assigned.

B. HILL, representing SULLIVAN & BROWN, for plaintiffs in error.

H. HOLT, representing DUDLEY & CRAWFORD, for defendant.

By the Court.—WARNER J. delivering the opinion.

[1.] The first error assigned upon the record is, that the Court below refused to grant the motion to have the execution entered satisfied, unless the entries thereon by the Sheriff were explained.

It appears by the returns of the Sheriff on the *fi. fa.* that property of the defendant has been sold, and the proceeds of the sale more than sufficient to have paid it off. The property, sold under the levy of 29th March, 1842, brought \$56 50, and the Sheriff returns that the whole amount was taken "*for costs on this and other fi. fas.*" The levy of 27th September, 1842, was sold for \$106 00, and the whole amount, according to the return of the Sheriff, was taken for costs. In accounting for the proceeds of the first levy, the Sheriff returns, that the whole amount thereof was taken "*for costs on this and other fi. fas.*" but what *other fi. fas.* does not appear. In accounting for the proceeds of the second levy, the Sheriff returns, that the \$106 00 was taken *for costs*. What costs? When the property of a defendant is seized and sold by the Sheriff, under judicial process, he has a right to know what has been done with the proceeds of such sale. If applied to the satisfaction of *other fi. fas.* he is entitled to know *what particular fi. fas.* If applied

to the payment of *costs*, he is entitled to know *what costs*, and to have the particular items of costs specified in the Sheriff's return. Here is an execution for less than one hundred dollars, including principal, interest and costs, by virtue of which one hundred and sixty-two dollars and fifty cents has been raised by the sale of the defendant's property, and the whole amount been applied, according to the returns of the Sheriff, to the payment of *costs*, without specifying what *particular items of costs*, or to what particular *fi. fas.* if any, the costs have been paid. According to the record before us, the Court refused the motion to have the execution entered satisfied, holding the returns of the Sheriff to be *legal* and proper, until the defendant disproved them. We are of the opinion that the returns of the Sheriff, as the same appear on the record, were neither *legal* nor *proper*, for the reasons already stated. Besides, it would have been extremely difficult for the defendant to have proved a *negative*. It was the duty of the Sheriff to have shown, by his returns, the *specific* appropriation of the money to the payment of costs.

[2.] The second assignment of error is, to the charge of the Court to the Jury.

The Court charged the Jury, "that the return of the Sheriff was *legal* and *proper*, and unless the defendant disproved the return that costs were due, as claimed by the Sheriff, for keeping *the cattle*, &c. that the Jury must find for the plaintiff, and that he was equally entitled to the costs, whether he kept *the cattle* himself or procured an *agent* to keep them for him." The Sheriff's returns do not show that any costs were charged for *keeping cattle*, nor does it appear from the record that there was any evidence before the Jury that the Sheriff kept any cattle of the defendant, for which he was entitled to charge costs, either by himself or *agent*. The charge of the Court appears to have been predicated on an *assumed* state of facts not proved before the Jury, and, therefore, as we have frequently held, *erroneous*.

Let the judgment of the Court below be reversed.

George W. Crawford, Governor, &c. *vs.* Howard and others.

No. 60.—GEORGE W. CRAWFORD, Governor, &c. for the use, &c. plaintiff in error, *vs.* WILLIAM HOWARD and others, defendants.

[1.] A Sheriff's bond, taken and approved by the Inferior Court, and averred to be delivered to the Governor of the State, and signed and sealed and attested by two of the Justices of the Inferior Court: *Held*, to be good at Common Law, but bad as a statutory bond, because not given within thirty days after the election of the Sheriff.

[2.] A Sheriff duly elected, but not having executed a bond, according to law, within thirty days after his election, is an officer, *de facto*, and his acts are valid, when they concern the public or third persons who have an interest in them.

[3.] The Sheriff and his sureties held to be liable, on a voluntary bond, for the acts of his deputies, although it contains no stipulation to that effect upon Common Law principles: *Held*, that such a stipulation is not necessary to the validity of a Sheriff's bond under our Statutes, and that if otherwise good, as a statutory bond, it would be good without such stipulation.

Debt, in Baker Superior Court. Decision by Judge WARREN, December Term, 1850.

This was an action against the sureties upon a Sheriff's bond, alleged in the declaration to have been executed and delivered to George R. Gilmer, then Governor of the State, conditioned, that "if the said Sheriff should well and truly do and perform all and singular the duties required of him in virtue of his said office of Sheriff, as aforesaid, according to law and the trust reposed in him, then the obligation to be void," &c. The breach assigned was the escape of a defendant in *ca. sa.* in the custody of the deputy appointed by the Sheriff. It appeared from the declaration, that the Sheriff was elected on the 1st day of January, 1838, and that the bond was given on the 6th day of February, 1838. It also appeared that the bond was attested by only two of the Justices of the Inferior Court.

Upon the trial, and before the cause was submitted to the Jury, the counsel for defendants demurred to the declaration, and moved for a non-suit on various grounds, which motion and

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demurrer were sustained by the Court on the following grounds :

1st. Because said office of Sheriff was forfeited, and said Sheriff ineligible, having let more than thirty days elapse before giving said bond, or taking the office of Sheriff.

2d. Because said bond was void as a statutory bond, and, though voluntary, was illegal and void, as at Common Law the two Justices of the Inferior had no authority to take it, and said Sheriff no power to do the acts required by the bond of him.

3d. Because the sureties could not be bound for the default of the deputy, as there was no clause in the bond to that effect, and it being admitted that it was not good as a statutory bond.

Each of these decisions was excepted to by defendants, and is assigned as error.

B. HILL and S. T. BAILEY, for plaintiff in error.

J. B. HINES, for defendants in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] We hold the bond in this case invalid as a statutory bond, because not taken in conformity with the law in this, that it was executed more than thirty days after the election of the Sheriff. 1 *Kelly*, 581. We do not hold that it is void under our Statutes, because it is not in terms a bond to hold the Sheriff liable for the acts of his deputy. The laws of this State make no such requirement. The Act of 1799 authorizes the Sheriff to appoint deputies, and declares that he shall be bound, in bond with security, for the faithful performance of his duty by himself and his deputies. This is an affirmance of the Common Law liability of the Sheriff. It does not mean that in the bond this liability shall be inserted, but simply declares that he shall give bond for the faithful performance of *his* duties, whether performed directly by himself or by his deputy. So, that if in other respects this bond were good under the Statute, we would not hold it bad, because there is in it no stipulation that the Sheriff shall be bound for the acts of his deputies. If the bond was good

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under the Statute, he would be liable on it without such stipulation. I shall advert to this doctrine again. *Prince*, 430. . 1 *Kelly*, 588.

[2.] The Court below held, that inasmuch as this bond was not given within the thirty days, the office of Sheriff was vacant—the Sheriff an usurper, and the bond at Common Law, as well as under the Statute, a nullity. Was the office vacant? The facts developed are few. The Sheriff was duly elected—gave bond, but not until thirty days after his election, and exercised the duties of the office for a length of time, perhaps an entire term. He was Sheriff of the County, *de facto*, and the obligations of the office, as to third persons and the public, attached. One is an officer, *de facto*, when he comes into office by color of election, and all his acts are good until removed. Ch. *Kent*, in *The People vs. Collins* said, “that law is too well settled to be discussed,” and stopped the counsel. 7 *Johns. R.* 551. In the same case the Chancellor said, “It is a well-settled principle of law, that the acts of persons in office, *de facto*, are valid when they concern the public, or the rights of third persons who have an interest in the act done. The limitation of this rule is as to such acts as are arbitrary and voluntary, and do not affect the public utility.” This rule is adopted to prevent the failure of justice. *Salk.* 43. *Ld. Raym.* 1244. 5 *T. R.* 56. *Cowp.* 413. 16 *Viner’s Abr.* 114. *The King vs. Lisle, Andrews*, 263. 10 *Mass.* 290. 15 *Ibid*, 180. 9 *Johns.* 135. 12 *Ibid*, 296. 5 *Wend.* 231. 3 *B. & Ald.* 266. 5 *Eng. C. L. R.* 278.

The Statute declares, that if the bond is not given according to the requirement of law, the office shall be vacant; but until so declared, he is Sheriff, *de facto*. The judgment of the Statute is, that if he fails to qualify, he forfeits the right to the office under his election. But the proper officers of the law must pronounce the judgment of forfeiture; then he would be an usurper; his acts would, after that, be volunteer acts—nobody would be bound by them, and he would be liable only as any other citizen for whatever he might do contrary to law. The bond in this case, by the confession of the pleadings, being given after the time when the Statute requires it to be given, is void;

but the officer is still, *de facto*, Sheriff. Upon a *quo warranto*, I do not doubt but that it would be competent for him to show that the irregularity in giving the bond was without fault on his part. The bond is good, as a voluntary bond, at Common Law. The declaration avers, that it was executed and delivered to George R. Gilmer, then being Governor of the State. It is signed and sealed; these are the requisites of a bond at Common law. Considering it now in the light of a voluntary obligation, it is immaterial whether it is attested by two or more or no one of the Inferior Court; it is a good bond without any attestation. Nor in this light is it material to enquire whether it was approved by the majority of that Court or by a Judge of the Superior Court or not; if it were, the declaration avers that it was approved by the Inferior Court. It is stated that it was *taken and approved* by the Inferior Court. Upon this motion for a non-suit, which is but a demurrer to the action, all these statements are to be taken as true. The averment that it was executed to George R. Gilmer, then being Governor of the State, is an averment that it was delivered to the appointees of the law—the Inferior Court. So, also, it is in legal contemplation delivered to him, when it is, in fact, delivered to the Inferior Court, who are directed to take it. It is quite sufficient to sustain this bond, so far as delivery is concerned, upon the averment that it was delivered to the obligee. There is no legal objection to the Inferior Court taking such a bond. 1 *Kelly*, 583. 10 *Peters*, 359. 3 *Kelly*, 499.

[3.] If the bond be good, by the rules of the Common Law, the sureties are bound to keep and make good the stipulations they have entered into. In this contract they bind themselves to see to it, that their principal will well and truly do and perform all and singular the duties required of him, in virtue of his office of Sheriff, according to law and the trust reposed in him. They have recognized him as Sheriff, in fact, whether legally qualified or not, and they agree that he shall well and truly do and perform the duties of that office. The declaration charges, that he has not done and performed the duties of the office, but has permitted an escape, on final process, to the in-

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jury of the plaintiff. They are liable, if the facts be as charged. They cannot aver against their own voluntary undertaking. It appears from the declaration that the process was handed to the Sheriff, and the arrest was made by his deputy. It is argued, **then, that** upon Common Law principles, the sureties are not bound, inasmuch as they did not in the bond stipulate for the acts or omissions of deputies, but for the personal acts alone of the principal. We think that, in agreeing to be bound for the principal, they are legally bound for all his acts or omissions, whether by himself directly or by his agents. This is true, according to the law of principal and agent. The principal is liable for all the acts and omissions of his general agent done or omitted within the scope of the agency. The deputy is the general agent of the high Sheriff, to do and perform all acts which by law appertain to his office; one of which is to keep a party arrested under legal process. An escape will charge the principal, whether permitted by himself or his deputy. "The master," says Judge *Story*, "is always liable to third persons for the misfeasances, negligences and omissions of his servant in all cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, negligences and omissions of duty of his agent, leaving him to his remedy over against the agent, in all cases where the tort is of such a nature as that he is entitled to compensation." *Story on Agency*, §308. 12 *Mod.* 489. *Sayer's R.* 40, 41.

The rule in these cases is *respondeat superior*. Lord *Holt*, in his opinion in *Lane vs. Cotton*, (12 *Mod.* 488,) says, "A servant or deputy, *quatenus*, such cannot be charged for neglect, but the principal only shall be charged for it. But for a misfeasance, an action will lie against a servant or deputy, but not, *quatenus*, a deputy or servant, but as a wrong doer. As, if a Bailiff, who has a warrant from the Sheriff to execute a writ, suffer his prisoner, by neglect, to escape, the Sheriff shall be charged for it and not the Bailiff," &c. *Story on Agency*, §310. *Cameron vs. Reynolds*, *Cowp.* 403. *Paley on Agency*, 396, 397, and notes. 7 *T. R.* 35. 7 *Cowen*, 739. 1 *Wend.* 16. 1 *Bingham*, 150. Our

Statute, which makes the deputy liable for his own acts, expressly reserves the liability of the principal. *Cobb's Analysis*, 123.

If this be the rule of liability of the principal, there is no doubt but that sureties who stand for his liabilities are bound, without express stipulation, for the acts of his deputy or agents. They trust to his fidelity and competency, and risk his discretion in the appointment of agents. Third persons look to him for the faithful execution of his trust, and to the security which he has given. The sureties make good his official omissions, negligences or misfeasances, as the law will charge him. It is immaterial whether he has a deputy or twenty or none; they are bound for the faithful execution of his trust. It is a familiar principle, that the liability of sureties is measured by that of the principal, unless they stipulate for a less liability.

Let the judgment be reversed.

NO. 61.—CHARLES CLEGHORN, plaintiff in error, vs. THE INSURANCE BANK OF COLUMBUS, defendant in error.

- [1.] The rule, that the joint estate is to discharge the joint debts in the first place, and the separate estate the separate debts, and that neither can invade the funds of the other until the particular class of debts is satisfied out of its appropriate fund, considered and *questioned*.
- [2.] Even admitting the rule as a principle of general equity, it will not be enforced to the exclusion or postponement of the joint creditors, so long as they have recourse *at law* against the separate estate; that is, the equity in favor of the separate creditors will not be allowed to control or take away a right acquired by an execution at law on the part of the joint creditors against the separate estate.
- [3.] It is only when the legal recourse of the joint creditors against the separate estate is terminated, and they have no claim against those assets, except in Equity, as in the case of the death, bankruptcy, or perhaps statutory assignment in insolvency of a partner, that the joint creditors are postponed.

Motion to distribute money, in Baker Superior Court. Decision by Judge WARREN, December Term, 1850.

A. fa. controlled by Charles Cleghorn vs. Charles L. Bass, James S. Calhoun and others, was levied on the separate property of James S. Calhoun. The proceeds of that levy being in the hands of the Sheriff of Baker County, a rule *nisi* was taken against him to show cause why the same should not be paid over to a *fi. fa.* founded upon an older judgment in favor of the Insurance Bank of Columbus vs. Calhoun & Bass, as partners, on which last judgment a return of "*nulla bona*" had been entered.

Upon the return of the Sheriff being made, and argument heard in behalf of both creditors, the Court granted an order requiring the Sheriff to pay the money in hand to the *fi. fa.* in favor of the Insurance Bank.

To this decision Charles Cleghorn, by his counsel, excepted and has assigned error thereon.

R. K. HINES, Jr. for plaintiff in error.

McDOUGALD and CARITHERS, for defendant in error.

Brief of R. K. HINES, Jr.

1. It was a settled rule of Equity, before the passage of our Statutes, that copartnership debts should be first satisfied out of the copartnership assets, and private debts had the same preference as to the separate property. 2 *P. Williams*, 500. 3 *Vesey, Jr.* 240. 9 *Vesey, Jr.* 124. 14 *Vesey, Jr.* 447. *Gow on Part.* 314. *Collyer on Part.* 520, '21. 3 *Kent's Com.* 64, '5. *Story on Part.* §§363, 376. *Story's Eq. Jur.* 675. 6 *Paige*, 20. 1 *Amer. Leading Cases*, 310. 3 *Paige*, 527. 2 *McCord*, 301.

Cases of above, where there was no joint property. 14 *Vesey, Jr.* 447. *Story on Part.* §363. 3 *Paige*. 171 to 174. 9 *Vesey*, 124. 1 *American Leading Cases*, 310.

2. Our Statute (1820) only regulates the practice as to serving co-contractors and co-partners, but did not alter the equities between partnership and separate creditors; and had ~~that been~~ the intention, inasfar as it deviated from its title for that purpose, is unconstitutional. *Prince*, 445.

3. Our Judiciary Act makes a Judgment bind all of the property of defendant from its date; but this does not alter the rule in Equity, that as he has two funds, he should resort to that one on which others have no claims, or the rule of Law, requiring him to show there is no solvent partner.

4. The equities of the case be looked into on motion to distribute money. *Winter vs. Garrard*, 7 Ga. Rep. 185.

By the Court.—LUMPKIN, J. delivering the opinion.

The Insurance Bank of Columbus, holding an execution against the firm of Calhoun & Bass, which firm was composed of James S. Calhoun and Charles L. Bass, moved a rule against James G. Johnston, Sheriff of Baker County, to show cause ~~that~~ he should not pay over to the plaintiffs, certain money in his hands, arising from the sale of the property of James S. Calhoun, one of the defendants. The Sheriff, in return to said rule, showed that a *fi. fa.* from Muscogee Superior Court, of William Foster vs. Charles L. Bass, James S. Calhoun and others, and transferred to Charles Cleghorn, was placed in his hands by R. K. Hines, Jr. as attorney for the assignee, with direction to levy the same upon certain lots of land in said County; that in pursuance of said instructions, he levied upon and sold said lots as the individual property of James S. Calhoun; and that, after deducting costs, it left in his hands the sum of \$233, subject to the order of the Court.

Upon ~~the~~ answer and argument had thereon, Judge Warren determined that the fund should be paid over to the execution in favor of the Insurance Bank, it having the oldest judgment lien, and there being a return of *nulla bona* thereon as to any joint property. To which opinion counsel for Cleghorn excepted.

[1.] The conflicting claims of copartnership and separate

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creditors have been a fruitful source of litigation, both in England and in this country. The main point of contestation is, whether the rule, that joint creditors have a primary claim upon the joint estate, and only the surplus goes to the separate creditors, and *vice versa* as to separate creditors and separate estate, is a general rule in Equity, or restricted to cases of bankruptcy and founded upon the Statutes of Bankruptcy? I forbear to inquire into the origin of this rule, or to trace its history and fluctuations since its introduction.

Chancellor *Kent* declares that he feels no hostility to the doctrine, even as a general rule of Equity, and thinks that it is, upon the whole, reasonable and just. To doubt, under such circumstances, might well expose one to the charge of temerity, were it not that the rule has been discarded, after great consideration, by many of the Courts of this country, as well as by the ablest transatlantic jurists. *Ex parte Hayden*, 1 Bro. C. C. 454. *Ex parte Hodgson*, 2 Bro. C. C. 5. *Ex parte Copland*, 1 Cox, 420. *Ex parte Page*, *ib.* 119. *Lodge vs. Fendall*, 1 Ves. Jr. 196. *Ex parte Bauerman & Christie*, 3 Deacon, 476, 484. *Bell vs. Newman*, 5 Serg. & Rawle, 78. *In the matter of the estate of Pagan*, 1 Ashmead, 347. *Reed vs. Shepherdson*, 2 Vermont Rep. 170. *White vs. Dougherty et al.* *Martin & Yerger*, 309, 321. *Grosvenor & Co. vs. Austin's adm'r*, 6 Ohio, 103. *Dahlgren vs. Duncan et al.* 7 Smede & Marshall, 280.

Lord *Eldon*, in *Barker vs. Goodan*, (11 Ves. 786,) stated that this rule was practiced upon in Chancery every day, but admitted that he did not know how it became law. He remarked that they had in some degree pursued it in the administration of assets, though very tenderly. And Judge *Story* admits, also, that the rule rests on as questionable and unsatisfactory a foundation as any in the whole system of our jurisprudence, but concludes that it had best not be overthrown, as it would be difficult to substitute any other that would work with perfect equality and equity. *Story on Partnership*, 530, 541. The learned commentator concedes, however, that if the true doctrine be that avowed by Sir William *Grant*, in the case of *Devaynes vs. Noble*, (1 Meriv. 529,) and afterwards affirmed by Lord *Brougham*, (2 Russ. &

Mylne, 494,) that a partnership contract is several as well as joint, then there seems no ground to make any difference whatsoever in any case between joint and several creditors as to payment out of joint or separate assets. 1 *Story's Eq. Jur.* 626, notes.

In *Tuckers vs. Oxley*, (5 *Cranch*, 35,) Judge *Marshall* considered that even in bankruptcy, the rule when properly understood, was nothing more than the equitable principle of compelling the joint creditors, as having two funds, to exhaust the fund which was appropriated to them before coming upon the fund to which the separate creditors were also entitled.

Now, I can very well understand why the rule should be maintained upon the principle of two funds, whenever the facts will justify its application; that is, if there were partnership effects in this case, which had not been exhausted, it might be equitable to force the joint creditors to proceed first against these partnership effects; or, if *Cleghorn's fi. fa.* was against *Calhoun* only—that of the Insurance Bank being against *Calhoun & Bass*—Chancery would interfere and compel the latter to go against *Bass*, provided he was solvent. But where, as in the present case, the partnership is insolvent, and where the claim of the separate creditor is against each of the joint debtors, I should be exceedingly reluctant to recognize a rule which was adopted as one of convenience merely, and which excludes a creditor of the partnership from all share of the separate estates of the partners until the separate debts are paid, or which would, on the other hand, exclude a separate creditor from all share of his debtor's joint property until the joint debts are paid.

On the delivery of this opinion, and before I had had an opportunity of consulting any of the American authorities, I ventured the opinion that the rule under discussion was founded upon a basis ~~radically~~ unsound, namely: that the funds are to be liable on which the credit was given—that in contracting with a partnership, the credit is supposed to be given to the firm; but those who deal with an individual member, rely on his sufficiency. I insisted that we trusted everybody for what he is supposed to be worth; and I am gratified to discover that Chief Justice *Tlgh-*

man in *Bell vs. Newman*, took the same view of this subject. He says, "The truth is, that persons who trust the partners, either in their separate or partnership character, generally do it on the credit of their *whole estate, both joint and separate*." "When men," he continues, "enter into partnership, they often borrow money on their private accounts for the very purpose of creating partnership stock; and this they may continue to do during the partnership. And on the other hand, the individuals of a partnership often withdraw money from the joint stock and convert it to separate property, in such a manner that it cannot be traced or identified. In such cases," he adds, "it is evident that this rule in bankruptcy works cruel injustice."

That such a rule should have been *yielded to*, (for it appears never to have been firmly established,) in a country where the bankrupt system has been "*in full blast*" ever since the reign of Henry the Eighth, is not surprising. It saves a vast amount of trouble in settling intricate accounts between partners in the disposition of the bankrupt's estate; but, as a new question, the rule never could have obtained in a country like ours.

[2.] But conceding the rule to be settled as contended for, and the weight of authority, if not of justice, is perhaps in its favor, especially in Chancery adjudications in Britain before the revolution; and grant, moreover that it is applicable not only in bankruptcy, but upon general equity;

There is another feature in this case which withdraws it from its operation. It is in a Court of Equity only that the joint creditor can be restrained from proceeding against the separate estate. The equity in favor of the separate creditors will never be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate.

[3.] And it is only when the legal recourse of the joint creditor against the separate estate is terminated, and they have no claim against these assets, except in Equity, as in case of the death, bankruptcy (or perhaps statutory assignment in insolvency) of a partner, that the joint creditors are postponed. ~~And this is agreed to be law even in those Courts which recognise the rule I have~~

been considering as a principle of general equity. 1 *Amer. Lead. Cases*, 325. *Allen vs. Wells*, 22 *Pick. R.* 455. 1 *Har. & Gill*, 96. 1 *Stor. Eq. Jur.* 625.

Inasmuch, then, as the Insurance Bank is not invoking the aid of Equity to enforce its lien, but is asserting in a Court of Law its legal rights against the legal estate of one of the partners, there is no reason why its judgment lien should be excluded or postponed in behalf of the separate creditors. We consequently hold that the rule, as applicable to the facts and circumstances of this case, was correctly stated by the presiding Judge on the circuit.

Judgment affirmed.

No. 62.—WILLIAM ELLIS, plaintiff in error, vs. CORDAL FRANCIS, defendant in error.

[1.] Where a Constable who did not write a good hand, requested a Justice of the Peace, in *his presence*, to make a return of "no property" on two Justices' Court *fi. fas.* he knowing the return to be true of his own *personal* knowledge: *Held*, that the return was to be considered as the act of the Constable himself, and valid in law.

[2.] Where a verdict was rendered in a claim case, in which the plaintiff in execution had been dead four years, and whose estate was unrepresented before the Court: *Held*, that the verdict ought to have been set aside on motion.

Claim, in Sumter Superior Court. Tried before Judge WARREN, November Term, 1850.

This was an issue upon a claim to a tract of land levied on by two Justices' Court *fi. fas.* in favor of Cordal Francis vs. Major Ellis and another, issued in August, 1841, with an entry of "no property," by Joseph Tarbutton, L. C. dated in April, 1847. On the trial the claimant proved by Joseph Tarbutton, that the en-

try was not in his handwriting, but was made by one of the Justices of the Peace, in the presence of and at the request of witness, he knowing the fact to be true, and not writing a good hand himself.

Counsel for claimant requested the Court to charge the Jury, that the *fi. fas.* were dormant—the Constable not being authorized by law to delegate the authority to perform those duties required by law of him.

The Court refused so to charge, but instructed the Jury, that if the entry was made in the presence and under the direction of the Constable, that it was valid. To which charge and refusal to charge, the claimants excepted, and have assigned error thereon.

After the verdict was returned, and before judgment thereon, counsel for claimant moved the Court to set aside the same, on the ground that the plaintiff, Cordal Francis, was dead, and had been for four years, which fact was proven to the Court. The Court refused the motion, unless the claimant would file his affidavit, that he was ignorant of the fact at the time of trial, which the claimant declined to do. The Court then offered to grant claimant a rule *nisi* against the attorney conducting the cause, to show cause at the next term why the verdict should not be set aside, which the claimant declined to accept. The Court then overruled the motion to set aside, and this decision is assigned as ground of error.

B. HILL, for plaintiff in error.

J. B. HINES, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The first question made by the record in this case is, whether the return of *nulla bona* upon the two Justices' Court *fi. fas.* made by Joseph Tarbutton, lawful Constable, is a valid return. It is insisted by the plaintiff in error the return is not valid, because made by another person for the Constable; that the Constable could not delegate his authority to another to act for

him in regard to his *official* business. The Constable, who was examined as a witness, stated that the entry on the *fi. fas.* was not in his handwriting, but was made by one of the Justices of the Peace, in *his presence* and by *his request*, he *knowing the fact to be true*, and that he did not write a good hand himself. We are of the opinion this return on the *fi. fas.* of "no property" being made in the *presence* of the Constable, and by *his request*, with a *personal* knowledge of the truth of the return, may be considered as the act of the Constable himself, as much so as if he had held the pen in his own hand, and the Justice of the Peace had directed it in making the entry.

[2.] The second ground of error taken is, the refusal of the Court to grant the motion to set aside the verdict, on the ground that the plaintiff in the execution was dead. It was made to appear to the Court, that the plaintiff had been dead four years previous to the trial. The Court refused the motion, unless the claimant would file his affidavit, that he was ignorant of the fact at the time of the trial, which the claimant declined doing, and insisted on his motion to set aside the verdict. This motion, in our judgment, should have been granted, for the reason that the trial was a nullity when one of the parties was dead and unrepresented before the Court.

If the counsel had knowledge of the fact of the death of the party, and failed to suggest the same to the Court at the trial, that is a matter for the Court to consider, whether as officers of the Court they acted in good faith, or intended to practice a fraud upon the Court; but however that may have been, it cannot prevent the verdict from being considered as void in law, and consequently ought to have been set aside. See *Tedlie vs. Dill*, 3 *Kelly*, 104.

Let the judgment be reversed.

No. 63.—JOHN FLYNT and Wife, plaintiffs in error, *vs.* ELIJAH HATCHETT, trustee, &c. defendant in error.

[1.] When an action is brought by a *cestui que trust*, to enforce against the trustee the provisions of the trust-deed, and he does not deny the complainant's interest in the trust estate, but defends upon other grounds, the limitation to the suit is the time applicable to sealed instruments.

[2.] The Statute of Limitations does not run against a married woman, to whom property had been left in trust, after her coverture, she being within the exception in the Statute in favor of *feme coverts*, in a case where she and her husband are suing in Equity for the recovery of the property.

In Equity, in Harris Superior Court. Tried before Judge ALEXANDER, September Term, 1850.

On the 28th March, 1826, William Hatchett executed and delivered to John B. Hatchett a deed of trust, conveying certain lands and negro slaves, and a considerable quantity of personal property, first to pay the debts of said William, then in trust for the use of the wife of William Hatchett and his minor children, during the natural life of said William, and at his death to assign one-third part thereof to the wife of said William, to be enjoyed during her life, and at her death, to be equally divided by said John B. Hatchett between the children of said William; the remaining two-thirds to be divided between the children at the death of the said William. About the first of the year 1834, William Hatchett died. At which time John B. Hatchett assigned one-third to the widow, and divided the major part of the remainder between some of the children, omitting John Flynt, who married one of the children of William Hatchett.

In May, 1839, the widow of William Hatchett died, at which time John B. Hatchett took possession of the remaining third of the property, and again made distribution, omitting John Flynt and wife.

In November, 1845, John Flynt and wife filed their bill in Equity, alleging the foregoing facts, and others not necessary to be here repeated, and praying an account by Hatchett, the trus-

tee. Flynt and wife were married before the execution of the deed by William Hatchett.

John B. Hatchett, by his answer, admitted the foregoing facts, and assigned as a reason why Flynt and wife were not included in the distribution, that at the time of their marriage, and before the execution of the deed of trust, William Hatchett placed in their possession a negro woman, (not included in the deed,) on condition that the said negro was to be accounted for on a final settlement of the portion of said Henrietta Flynt; that John Flynt was notified of the distribution at the time it was made; that the value of said negro woman exceeded the amount of a distributive share under said deed of trust, and that Flynt and wife were, therefore, fully paid off. He also insisted upon the Statute of Limitations.

Upon the trial, the presiding Judge charged the Jury, "That said suit was not founded upon the deed of trust executed by William Hatchett to John B. Hatchett, and that the Statute of Limitations for sealed instruments, viz: twenty years, was not applicable thereto."

To this decision and charge complainants excepted.

The Court farther charged, "That notwithstanding they might believe that Henrietta Flynt was a *feme covert* at the time of the accrual of the rights under the deed of trust, and of the cause of action, and was still a *feme covert*, yet the case did not fall within the exceptions to the Statute of Limitations in favor of *feme coverts*; and that if more than *four* years had elapsed from the distribution of said estate, with notice to complainants, before the commencement of said suit, the rights of complainant were barred by the Statute of Limitations."

To which charge complainants excepted.

On these exceptions error was assigned.

B. HILL, for plaintiff in error, made the following points:

1st. The Court erred in charging that this suit was not founded on the deed of trust, and that the Statute of Limitations for sealed instruments was not applicable to the case.

Flynt and Wife *vs.* Hatchett.

We contend that the rights of the trustee being solely derived from the deed of trust, the trust being accepted by him, the rights of the *cestui que trust* against both the grantor and the trustee, are derived from the deed.

We also contend, that it was not necessary for the trustee to accept under seal.

Even in covenants, "if A covenants generally to indemnify B, B may have covenant, though he did not seal the articles, and the covenant was not with him." *Com. Dig. vol. 3, Covenants, A. 1, p. 250.*

So, if one lease to A and B by indenture, and A seals a counterpart, and B agrees to the lease, but *does not seal*, yet B may be charged for a covenant broken. *3 Com. Dig. lb.*

And yet covenant cannot be supported except *upon a sealed instrument*. See also, *Ketchum vs. Catlen*, 6 *Wash. Rep.* 292. *3d vol. U. S. Law Mag.* 85. *1 Kelly*, 231.

A trustee having accepted the trust, cannot divest himself of it afterwards, without performance, except by aid of Chancery. *4 Kent's Com.* 311.

2d. The Court erred in charging, that although Mrs. Flynt was a *feme covert* at the time of the accrual of the cause of action, and is yet a *feme covert*, still the case is not within the exception of the Statute of Limitations. *Prince's Dig.* 577.

We contend that the rights involved in this case are, to *all intents and purposes, those of the wife*.

1. The husband cannot sue for it without joining his wife. *Blount vs. Bustland*, 5 *Ves.* 515. *Carr vs. Taylor*, 10 *Ves.* 578. *Loughn vs. Nonry*, 3 *Ves.* 467. *Scharyler vs. Hoyle*, 5 *John. Ch. R.* 210.

And in this there is no distinction between rights accruing *before and during coverture*, except as to choses in action *that can be recovered at Law*. 5 *Ves.* 515. 10 *Ib.* 578. 5 *J. Ch. Rep.* 210. And even these may be enjoined. *Note*, 5 *Ves.* 515. 5 *J. Ch. R.* 477.

2. In such suits the Court will settle the recovery on the wife, unless the wife expressly waive the settlement. *Kenny vs. Udall*, 5 *J. Ch. R.* 473. *Hoodland vs. Myers*, 6 *Ib.* 25. 5 *Ib.*

207. *Clancy*, 444. 2 *Bail. R.* 477. *Sayre vs. Flourney*, 3 *Kelly*, 547.

3d. And this, although the husband has assigned for a valuable consideration to a creditor, and here, also, there is no distinction between rights accruing *before* and *after* coverture. *Kenny vs. Udall*, 5 *J. Ch. R.* 473. 6 *lb.* 25. 5 *lb.* 207, and cases cited.

4th. On the husband's death, the right (and if a suit, then the suit) survives to her. *Schuyler vs. Hoyle*, 5 *J. Ch. R.* 208. *Stor. Eq. P.* 294. *Stephens vs. Beall*, 4 *Ga. R.* 321. *McDowd and wife vs. Charles*, 6 *J. C. R.* 132.

If, then, the property sued for is the wife's property, and we have shown that it is, then it is certainly within the exception of the Statute. See the case of *Sayer & Sayer vs. Flourney et al.* 3 *Ga. R.* 547.

If, then, the Statute in relation to *feme coverts* does not apply to a case like this, it cannot have any application: *Jackson vs. Johnson*, 5 *Cowen's Rep.* 76, 77. *Southerland*, *J.* 89, 93, 94. *Savage Ch. J.* 101. *Wordsworth, J. dis.* 104, 105, 106. 2 *Met. & Per. U. S. Dig.* 810. 2 *Sup. lb.* 361, 362.

5th. A legacy to a daughter was payable on her marriage, or when she became of age, and she married before coming of age, in a suit brought by her and her husband for the legacy, *after the lapse of six years*, held that she came within the exception of the Statute. *Ang. on Lim.* 208, 209. *Wood vs. Aiken*, 1 *Paige's Ch. R.* 616. Shall the Statute be made to run against the wife, as between her and her trustee? 2 *U. S. Dig.* 810. *Supplement, vol. 2*, 361, 362.

6th. Another construction of the Statute is, that it has never been construed so as to prevent a person laboring under a disability, from suing at any time *during* the disability. *Ang. on Lim.* 205, §4.

PORTER INGRAM, for defendant in error, presented the following points and authorities:

The action is not founded on an instrument under seal. *Ang. on Lim.* 94.

Flynt and Wife *vs.* Hatchett.

The *coverture* of one of the plaintiffs does not bring them within the *exceptions* in the Statute of Limitations; the disability must extend to all the parties. See *Statute of Limitations, Prince*, 577. *Barbour & Harrington's Digest*, 207, 218, and cases cited. *Turner vs. Debell*, 2 A. K. Marsh. 384. *Floyd vs. Johnson*, 2 Litt. 112. *Ridon vs. Frion*, 3 Murph. 577.

But there is no *disability* in this case—the wife is only a *nominal* party. The action might have been brought in the name of the husband alone. The title *vested* in him. The *disability* applies only to cases where the wife alone has the interest in the subject matter of the suit. 6 Ala. Rep. 589.

By the Court.—NISBET, J. delivering the opinion.

[1.] This action is founded on the trust deed. It is brought to enforce the trust. Whatever rights the complainants have, they grow out of the deed. They set forth the deed, and claim to be beneficially interested in the property which it conveys. Affirming, they claim under it. The legal title is in the defendant—he having accepted the trust. The complainants come into Equity, to divest his legal title, and to assert their claim as *cestui que trusts*. The defendant, in his answer, does not deny the deed, or his character of trustee, or that the complainants are interested in the trust property; but admitting all these things, defends upon the ground that, by the deed, the advance to the complainants by the grantor, is to be, by them, accounted for before they can receive anything farther; and that the advancement to them is greater than their share. They do not allege mismanagement. Both parties recognize the trust, and our opinion is, that the bill is founded on the deed, and that if it were a case wherein the Statute of Limitations would be applicable, the bar prescribed for sealed instruments would be the bar alone available for the defendant. In this we disagree with the Court below.

[2.] But it is claimed by the plaintiff in error, that Mrs. Flynt, who was a *feme covert* when this deed was executed, and who, with her husband, a party complainant in the bill, is within

the exception of the Statute of Limitations in favor of *feme covert*s. At the time that this deed was executed, she was married. When her rights accrued in the property, she was a *feme covert*, and has not been discovert. If she has, as a *feme covert*, rights under this deed, apart from her husband, she must be within the exception. She has such right, for first, if he dies before the property is reduced into possession, the action survives to her, and the property will vest in her to the exclusion of his representatives. Whatever may be the rule as to the wife's legal *chores in action* in a Court of Law, it is clear that the husband cannot proceed in Equity, to reduce into possession a property accruing during coverture, without making her a party; because, upon his death before reduction into possession, it and the action survive to her. *Schuyler vs. Hoyle*, 5 Johns. Ch. R. 196. *Carr vs. Taylor*, 10 Vesey's Rep. 578. 3 Vesey, 467. 5 Ib. 515. 5 Johns. Ch. R. 470. *Sayer & Sayer vs. Flournoy*, 3 Kelly, 546, '47. 2 Bla. Com. 351. *Clancy's Husb. and Wife*, 109. 4 Ga. Rep. 321.

Here the legal estate in the trustee could not be divested at Law. The husband had no alternative but to go into Equity, and then, no alternative but to make his wife a party. What, then, is his right? It is the right of reduction into possession, and no more. All other interest in the property is in the wife. But this naked right of reducing into possession, secondly, is always subject to the wife's equity, which, in equitable contemplation, is the whole estate, because it is within the competency of Chancery to settle upon her, if circumstances require it, the whole estate. The doctrine of the wife's equity is well settled in this Court. She is entitled to a part or the whole against her husband, his creditors and assignees, at her own motion, or when the husband or other persons move in a Court of Equity to recover it. See *Sayre vs. Flournoy*, 3 Kelly, 546, '47. *Bell et al. vs. Bell*, 1 Kelly, 639, and authorities referred to in these cases.

The wife is to be viewed as the equitable owner, and being under coverture, her rights are protected by the exception in the

State of Georgia *vs.* Bell.

Statute in favor of *feme covert*s. Directly in point, see 1 *Paige*, 616.

Let the judgment be reversed.

No. 64.—THE STATE OF GEORGIA, *ex rel.* C. B. STRANGE, plaintiff in error, *vs.* WILLIAM A. BELL, treasurer, &c. defendant in error.

[1.] It is not competent for a County Treasurer to resist the payment of a debt, directed by the proper authority to be discharged out of the public funds, set apart in his hands for that purpose, upon the ground that he had been notified that the holder thereof was not the rightful owner of the property, upon the valuation of which the certificate had issued.

Mandamus, in Marion Superior Court. Tried before Judge ALEXANDER, September Term, 1850.

In 1847, the General Assembly passed an Act (among other things) to remove the County site of the county of Marion, from the town of Tazewell, to provide for the location of a new site, &c. By the 7th section thereof it was enacted, "That the Justices of the Inferior Court of Marion County shall appoint five other commissioners, whose duty it shall be to ascertain the value of the town property in the town of Tazewell, (the same to be fixed at the amount the owners thereof placed upon it in the returns of their taxable property for the year 1847,) and then assess the amount of depreciation of said town property, because of the removal of said county site; and the said commissioners shall execute to the owners of said town property, a certificate, declaring the damage thus sustained, which said certificate shall become a debt against the County Treasury of said County, and such certificate shall be received in payment for any contract for the purchase of any lot or lots sold in the new county site," &c.

The plaintiff, Charner B. Strange, in his petition for a mandamus, alleged that the commissioners, appointed under the Act, assessed the damage on property owned by him in Tazewell, at the sum of \$1782 88, and executed and delivered to him a certificate as required by the Act; that there were funds in the hands of the County Treasurer, William A. Beall, for the purpose of paying such certificates, and that he refused to pay the same.

In response to the mandamus *misi* granted by the Court, Beall, the County Treasurer, returned, among other grounds why the mandamus should not be made absolute, the following:

“4th. That the property claimed by said Strange, and upon which damages were assessed, as respondent has been advised and believes, did not, at the time said damages were sustained or estimated, belong to the said Strange; and this defendant has been notified by William Wells, Esq. of said County, not to pay said damages to said Strange, as he (Wells) was the owner of the property previous to, and at the time of the assessment of the same by said commissioners.

“5th. Because the respondent has been informed and believes, that Jordan Wilcher, Esq. was the owner of said property at the time of the passage of said Act by the Legislature, and that he sold the same to Wells previous to the assessment of said damages.”

Counsel for Strange demurred to these two grounds as insufficient. The Court overruled the demurrer, and held them good and sufficient grounds for refusing to pay said certificate. This decision is alleged to be erroneous.

B. HILL and WORRILL, for plaintiff in error.

BENNING, for defendant.

By the Court.—**LUMPKIN, J.** delivering the opinion.

The Legislature, in 1847, passed an Act to add a part of Stewart County to Marion; to point out the mode of electing commissioners to provide for the erection of a county site; to

dispose of the public buildings at Tazewell; to provide payment for the undertakers of the new court house; to levy an extra tax, and for other purposes.

The 7th section provides, "That the Justices of the Inferior Court of Marion County shall appoint five commissioners, whose duty it shall be to ascertain the value of the town property in Tazewell, (the same to be fixed at the amount the owners thereof placed upon it in the returns of their taxable property for the year 1847,) and then assess the amount of the depreciation of said property, on account of the removal of the county site, and the said commissioners were required to execute to the owners a certificate, declaring the damage thus sustained; which certificate, it is enacted, shall become a debt against the County Treasury." And it is further provided in the 12th section of the Act, "That for the purpose of discharging the debt incurred by building the new court house, as well as to pay the owners of town property in Tazewell, that the Justices of the Inferior Court be allowed to levy an extra tax, not exceeding seventy-five per centum on the general tax, which, together with the fund arising from the sale of the public property at Tazewell, shall constitute a fund, to be first applied to the payment of the new court house, and for the payment of the damages sustained by the owners of property in Tazewell, ascertained as aforesaid."

It is also provided by the Act, "That the certificate shall be received in payment for any contract for the purchase of any lot or lots sold in the new county site, contemplated as aforesaid." *Pamphlet Laws, 1847, pp. 71, 73, 74.*

In pursuance of this Act, Andrew Hood, Van Swearingen, Charles Womack, William Williams and William Hirst, were appointed commissioners by the Justices of the Inferior Court of Marion County; and the three first being a majority of the whole number, after being duly sworn to perform faithfully the trust thus delegated to them, did, on the 24th day of June, 1848, proceed to ascertain the value of the property in the town of Tazewell, and to assess the amount of the depreciation of the same, by reason of the removal of the county site, when it was found that Charner B. Strange, the relator, owned town property

of the value of \$3127 87½, and that the same was depreciated 57 per cent. by reason of said removal. Accordingly, the said commissioners, by virtue of the authority reposed in them by the law, as aforesaid, on the 30th day of June, 1848, certified that the said Charner B. Strange had been damnified \$1782 88½, and that the said sum was a debt against the County Treasurer of Marion, and to be received in payment of any purchase made by him of property at the new site, and to be first paid out of the extra tax to be levied as aforesaid, and from the money arising from the sale of public property at Tazewell, subject only to the priority of payment on account of the new court house.

On the 7th of March, 1849, the certificate thus issued in terms of the Statute, was presented to the County Treasurer, and payment thereof demanded; but William A. Bell, the Treasurer, refused to pay the certificate, alleging as a reason, among other things, that the town property claimed by Strange, and upon which the damages were assessed, did not belong to him, and that he (Bell) had been notified by one William Wells not to pay the said damages, or any part thereof, to Strange or his assigns, as he (Wells) was the owner of said property.

A mandamus *nisi* having been granted by Judge *Alexander* against Bell, the Treasurer, he sustained the objections thus interposed by the Treasurer at the hearing, and to reverse this decision this writ of error is prosecuted.

[1.] Was it a good excuse in the mouth of Bell, the Treasurer, that he had been notified of the existence, real or pretended, of an outstanding title in Wells, or any body else, paramount to that of Strange, in whose favor the certificate had issued?

We think not. The Treasurer is not at liberty to inquire into the truth or falsehood of the certificate. Neither is he or the County responsible for it. His duty is to obey the mandate of the commissioners; and having done this, the law casts the ægis of its protection over both him and the County. Nor is there any hardship in this, upon Mr. Wells or any one else claiming to be the true owner of the property upon which the assessment was made. Why did he not interplead, in order to bring the conflicting titles directly before the proper tribunals? Why may

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he not do it still? Suppose no proceeding is ever instituted for this purpose, is the fund to remain forever locked up in the vaults of the County Treasury?

The judgment below must be reversed,

No. 65.—BENJAMIN T. LOWE, for the use &c. plaintiff in error,
vs. JOHN MURPHY, administrator, &c. of JOHN A. SCOTT, dec'd.
defendant in error.

[1.] The plaintiff declared upon the following instrument, "This is to certify that I did, in the year 1844, purchase of B. F. White his tan yard and stock, for which I did promise to pay Benjamin T. Lowe, for the benefit of B. F. White, four hundred and seventy-five dollars; which *amount I hereby acknowledge to be unpaid and yet due*; and one note of hand for fifty-three dollars and fifty cents, which note is said to be lost or mislaid—each amount bearing interest from 1st January, 1845.

"(Signed.) JOHN A. SCOTT.

"September 23, 1847."

Held, that the foregoing instrument is, in legal contemplation, a due bill, and may be declared on as a promissory note.

Assumpsit, &c. in Harris Superior Court. Tried before Judge ALEXANDER, September Term, 1850.

This was an action upon the following account, annexed as a bill of particulars:

"John A. Scott to

"Benj. T. Lowe, for use, &c.

Dr.

To 1 tan yard and stock, - - - - - \$475 00

" amount of promissory note, lost or mislaid, 53 60

\$528 60

Upon the trial, plaintiff's counsel moved to amend their declaration by inserting a count upon the following instrument, describing the same as a promissory note:

"This is to certify that I did, in the year 1844, purchase of B. F. White his tan yard and stock, for which I did promise to pay to Benjamin T. Lowe, for the benefit of B. F. White, four hundred and seventy-five dollars, which amount I hereby acknowledge to be unpaid, and yet due; and one note of hand for fifty-three dollars and fifty cents, which note is said to be lost or mislaid: each amount bearing interest from the 1st January, 1845. Sept. 23, 1847.

"(Signed,)

JOHN A. SCOTT."

The Court rejected the amendment, deciding that the instrument was not a promissory note and could not be declared on as such. This decision is the first error assigned.

Plaintiff's counsel then moved to amend by adding the following as a count:

"And your petitioner further sheweth that the said defendant is indebted to him in the further sum of five hundred and twenty-eight dollars and sixty cents, besides interest, on a written promise and acknowledgement, dated and due on the 23d September, 1847, which said sum the said defendant refuses to pay." To this count was annexed a copy of the instrument above set forth.

The Court rejected the amendment, and this decision is assigned for error.

The plaintiff having proved the execution of the above described instrument, offered the same in evidence, under the original declaration.

The Court rejected the evidence, and this decision is assigned for error.

H. Holt, for plaintiff in error.

BENNING & INGRAM, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] If the instrument declared on by the plaintiff is, in contemplation of law, a due bill, then it may be declared on as a promissory note. *Kemball vs. Huntington*, 10 *Wendell's Rep.* 675. By transposing the words of the instrument, without altering its legal effect, it will read as follows: "Due Benjamin F. Lowe, for the benefit of B. F. White, four hundred and seventy-five dollars, for his tan yard and stock, purchased of B. F. White, and fifty-three dollars and fifty cents for one note of hand which is said to be lost or mislaid—each amount bearing interest from 1st January, 1845. (Signed,) JOHN A. SCOTT.

"Sept. 23, 1847."

The inquiry is, does this paper import an engagement that money shall be paid absolutely? If it does, no matter by what words, it is a good note. *Luqueen vs. Prossen*, 1 *Hill's N. Y. Rep.* 259. In *Brewer vs. Brewer*, (6 *Ga. Rep.* 588,) we held the following instrument to be a due bill:

"I do hereby acknowledge the credit of three hundred and thirty-two dollars and fifty cents, to be due to the estate of Drewry Brewer, deceased. (Signed,) CLARK BREWER.

"August 5th, 1847."

See also *Carey vs. McDougald*, 7 *Ga. Rep.* 85.

We are of the opinion the paper declared on by the plaintiff imports an engagement to pay money, and states also the consideration for that engagement, and is a due bill in contemplation of law, and may be declared on as a promissory note. The amendment offered by the plaintiff to his declaration ought to have been allowed.

Let the judgment of the Court below be reversed.

No. 66.—RANSOM PARHAM, plaintiff in error, vs. THE JUSTICES OF THE INFERIOR COURT OF DECATUR COUNTY and others, defendants in error.

- [1.] Private property may be taken for public use without compensation, in cases of extreme necessity, without the consent of the owner; for example, the pulling down of houses, and raising bulwarks for defence against an enemy, or for the erection of ramparts against an invading foe.
- [2.] The general rule is, that private property cannot be taken for public use, without just compensation; and cannot be so taken without an Act of the Legislature authorizing it, and the Act must make provision for the compensation.
- [3.] That provision of the Federal Constitution, which prohibits the taking of private property for public use, without just compensation: *Held* to be an affirmation of a great principle of the Common Law.
- [4.] The Legislature must judge of the necessity or utility of the exercise of the right of eminent domain for public improvements; but in case of gross abuse of it, as when, under pretext of public utility, the property of A is taken and given to B, the Courts will interfere and set aside the law.
- [5.] The laws of this State, which authorize the opening of public roads over unenclosed lands, without just compensation, held to be void.
- [6.] Under the laws of Georgia which authorize the laying out and opening of public roads over the enclosed lands of the citizen, the Inferior Court may order a review, for the purpose of determining whether a road be necessary or not, and may also order the same to be opened before compensation is made or tendered, but cannot enter upon and seize, and permanently appropriate the land, until compensation is made or tendered.
- [7.] A citizen cannot enjoin the opening of a public road over his enclosed lands, when it appears from his bill, that he has not taken the steps pointed out by the law to procure the assessment of his damages.
- [8.] Nor upon the ground that the reviewers appointed by the Inferior Court, signed the petition for the road, and took an active interest in getting it up.
- [9.] Nor upon the ground that it does not appear, from the return of the reviewers, that they were not sworn according to the requirement of the Statute.

Application for an injunction, in Decatur Superior Court. Decision by Judge WARREN, 6th of December, 1850.

This was an application for an injunction to restrain the Inferior Court and Commissioners of Roads, from opening a new

public road, passing through the enclosed and unenclosed lands of complainant, Ransom Parham. The bill alleged, that a petition was presented to the Court for the opening of this road, signed by many persons who did not live in the neighborhood; that the same was gotten up, not for the public convenience, but by persons interested in having a road to a certain landing on Flint River, where the new road would cross; that a counter petition was presented to the Court, which they refused to consider; that the Court evidenced their partiality in the appointment they made of reviewers and commissioners to open the road—the same not being proper and discreet persons—one of them wishing the road to pass his house, where he kept spirits to retail; that another had but lately removed into the County, and the third having acted as main agent in procuring signatures to the said petition, and all of them being among the petitioners for the road; that complainant objected to their appointment, or the appointment of any one, because the road prayed for was not required for the public convenience, nor was it the nearest and most practicable route between the points specified as the *termini* of the road; because it would cause irreparable injury to the land and growing crop of the complainant, and because complainant offered to the Court, at his own expense, to cut out and open a shorter and better road between the points designated; that the Court, notwithstanding his objections, appointed the reviewers, two of whom afterwards reported that they had viewed and marked out the contemplated road; which return complainant objected to as illegal—

1st. Because one of the commissioners failed to act or join in the report; and

2d. Because it did not appear that the commissioners, before entering upon their duty, were sworn (as required by law) before a Justice of the Peace;

That the Court overruled the objections, and granted an order opening the road—the execution of which order was now sought to be enjoined.

By an amendment to the bill, it was alleged, that the Inferior Court had not, nor had any of the defendants paid, or offered to

pay, any of the damage, (amounting to at least \$2500,) which would be done to the land of complainant, but threatened to proceed to open the said road, without and before paying, or offering to pay the same; whereas, by law, he was advised and believed, that no authority or power was vested to open said road, until the damages were paid, or full and just compensation tendered to complainant.

The prayer was for a perpetual injunction to restrain defendants from cutting a road through complainant's land, whether enclosed or unenclosed; or at least, they should be enjoined, until full and just compensation should be paid or tendered to complainant.

Upon hearing argument, the presiding Judge refused to grant the injunction, upon the following grounds:

1st. Because the laying out and altering new and old roads, is expressly within the power and control of the Justices of the Inferior Court, subject alone to their discretion as to whom they shall appoint to review, lay out and open said road.

2d. Because as to improved or enclosed lands, the Statute of 1799 provided compensation to those injured by the opening said roads, and that if the provisions of that Statute were followed, the Inferior Court may take any improved lands they please for such road; and after such lands are thus appropriated, if the owner feels himself aggrieved, he may have the damages assessed by a Jury, and enforced by mandamus.

3d. Because the defendants, by the Act of 1818, have the right, power and authority to take and appropriate the wild and unenclosed lands of complainant, without any compensation—the Court holding the said Act to be constitutional and valid.

To these rulings and decision of the Court, exceptions were filed, and error has been assigned thereon.

S. T. BAILEY, for plaintiff in error.

LAW & SIMS, represented by B. HILL, for defendant.

By the Court.—NISBET, J. delivering the opinion.

The presiding Judge held, in this case, that it was competent for the Inferior Court, under the laws of this State, to lay out and open a road through the *unenclosed* lands of the complainant. This power is denied in this record. We are, therefore, called upon to determine whether, according to laws now in force in Georgia, the Inferior Court can exercise this power. It is a question of some magnitude in principle, and of great practical moment. It is very clear, that the Legislature may take the property of a citizen for purposes of public necessity or public utility. All grants of land are in subordination to the eminent domain which remains in the State; and from the necessities of the social compact, they are subject to this condition. The sovereign authority of the State, acting through the Legislature, is bound to protect and defend the State, and to promote the public happiness and prosperity of the people; and the Legislature is to judge when the public necessity or public utility requires the appropriation of the property of the citizen. I need not enlarge upon these propositions—they are the law of this Court, more than once promulgated. Nor do we deny, that a highway is a work of public utility. It is necessary to commerce and intercourse. Nothing can be more conducive to the social well-being and commercial prosperity of a State, than roads. It were pagan and aboriginal not to have them. Our doctrine farther is, however, that the property of the citizen cannot be taken for any purpose of public utility or convenience, unless the law which appropriates it, makes provision for a just compensation to the proprietor. This is true at Common Law, according to the *lex terræ* recognized and affirmed by *Magna Charta*, and it is true by the special ordainment of the Constitution of the United States.

I propose first to show, that the several Acts of the Legislature authorizing the building of roads, make no provision whatever for compensation, when the *unenclosed* lands of the citizen are taken for the purpose of a highway. The authority to lay out roads, is vested in the Inferior Court, by the Acts of 1799 and of 1818. Prior to 1799, the Inferior Court could and did lay out roads, but I find no Act of the Legislature, prior to that

time, which gives them any powers in relation to roads, different from those conferred by the Acts of 1799 and 1818. These two Acts contain all the provisions of law of force in this State relative to laying out public roads, and making compensation to the citizen. By the 1st section of the Act of 1818, it is declared, that "On application to the Inferior Court for any new road, or any alteration in an old road, the said Justices shall proceed to appoint three discreet and proper persons, residing in the neighborhood where such road is intended to pass, and in case they find it of public utility, they may proceed to mark out the same, on oath taken before any Justice, and report to said Court—the Clerk of which is hereby required to notify the Commissioners of Roads of such report." *Prince*, 735.

By the 19th section of the same Act, it is declared, that "In all cases where commissioners have been or may hereafter be appointed for the purpose of reviewing any new road intended to be laid out, and shall report to the Inferior Court the propriety of opening the same, the said Court may, if they or a majority of them deem it adviseable, pass an order for opening such road." *Prince*, 739.

Here, then, we have a general power to lay out roads deposited with the Inferior Court. The Legislature has made them its agents for the exercise of the sovereign power over this subject matter. They are, however, subject to the paramount authority of the Legislature. Notwithstanding this delegation of power, the Legislature may, if it will, exercise it. It is not pretended that there is any authority for the laying out and opening this road, but the general Acts before referred to. The only provision of law for making *compensation* in cases of a public road, is found in the second section of the Act of 1799, which was reenacted by the 34th section of the Act of 1818. The 2d section of the Act of 1799, is in these words: "And when any person or persons shall feel him, her or themselves aggrieved by reason of any road being laid out through his, her or their *enclosed* ground, it shall be the duty of any two or more of the Justices of the Inferior Courts, on application in writing by the person or persons injured, to issue a warrant, under their hands, directed

to the Sheriff of the County, to summon a Jury of freeholders, who shall be sworn to assess such damages; and that the Sheriff shall make and return a true inquisition thereof to the next Inferior Court; and it shall be the duty of such Court to order the amount of damages so assessed, to be paid out of the next County tax, or out of any public moneys belonging to the County fund: *Provided; nevertheless*, that when it shall appear to the Inferior Court, that the damages so assessed transcend the utility of that part of said road, such Court shall order the same to be altered in such manner as to avoid the *enclosed* ground so damaged, unless the person complaining shall agree to accept such compensation as shall be deemed just and reasonable by said Court." *Prince*, 733, 740.

This law makes provision for compensating the owner *only* when a public road is laid out through his *enclosed* ground. There is not, so far as I can ascertain, any provision in our laws for compensating the owner, where a road is laid out through his unenclosed or wild lands. Nor does it seem that this is a legislative oversight, for by designating enclosed grounds, they are to be held, as of purpose, excluding all other grounds. *Expressio unius est exclusio alterius*. Whatever may have been the reason of excluding other lands than enclosed lands from compensation; whether it was because of the additional value which opening and enclosing land gave to it, or because of the idea that unenclosed land, by reason of its abounding quantity at that day within our limits, had no or very little depreciable value; or, which is the likelier reason, because the Legislature believed that the opening of roads through the then greatly unsettled parts of the country, would enhance the value of lands over which they were laid out, quite equal to the damage caused by their appropriation; it is true, that they were excluded by the Act of 1799, and to this day they remain excluded. The law, as it now stands, has been acquiesced in by the people of this State for many years; indeed, I believe from the organization of the State Government. I do not know that the power of the Legislature to assume the unenclosed lands for the purpose of a *highway* has been, in a single instance questioned before the

Courts of Justice. The people have felt no serious inconvenience from it. On the contrary, the advantages of roads as the means of intercommunication—as the means of developing the resources of a country comparatively new, and a large portion of which has been and is yet but sparsely settled—have been so great and so obvious, that there has been no necessity or utility, until of late, in questioning it. Nor has there been manifested in the Legislature, any disposition to use the power oppressively. Acting in this matter heretofore, mainly through the Inferior Courts of the Counties—officers selected by the people from among themselves, with interests identified with them, and sympathies in harmony with theirs—the Government has used the power without abusing it, wisely and beneficially. The condition, however, of things in this State in reference to this matter, has become, of late years, widely different from what it was in 1818. Our limits being fixed—the Indians being removed, and our whole territory organized and subjected to the civil and criminal jurisdiction of the State, population has prodigiously increased—agriculture has improved—the mechanic arts, to a great extent, have been every where introduced—commerce has widened and deepened her channels, and lands have risen in value. Emigration to other States has decreased, and our population is becoming permanent. Our territory may be said to be really covered with rail road and plank road charters, using legislative grants, the lands of the people. These things give to the question before us a seriousness and vitality which it has not heretofore possessed. It has become a serious affair for a planter to yield his rich plantation to be traversed through its whole extent with highways—for the poor man to give up, perhaps, one third of his small farm, whether enclosed or not, to the public convenience and utility, as indicated in some magnificent rail road project, or some wide turnpike thoroughfare. In the earlier settled Counties of the State, I venture to say that there are few plantations where the owner could not

better afford to give to the Government a field, than the same number of acres of timbered land.

It may be, it doubtless is true, that our people have as good reason to confide in the justice and forbearance of the Legislature as they ever had. It may be, that in all the future, the Legislature may not, in a single instance, assume the land of the citizen, without a just compensation. We know not. But this we do know, that the power of government ever tends towards enhancement and encroachment. Corporation influence may become too strong for legislative resistance. Capital combinations may wield a power too potent for the popular will. Degeneracy may seize the times, and the virtues of simple, honest revolutionary republicanism depart. *The sacredness of private property ought not to be confided to the uncertain virtue of those who govern.* Principles conservative of popular rights, cannot with safety be abandoned; for if once abandoned, all history teaches that it is difficult, almost impossible, to resume them.

The general doctrine, that private property cannot be taken for public use, without compensation, has been more than once held here. The question, it is true, has come before us, except in one instance, in the construction of rail road charters, or bridge or ferry grants. The principle is the same in this case. Whether the property of a citizen can be taken at all or not, depends upon the use or necessity which requires it. The principle upon which the right of way for a rail road has been sustained is, that the rail road is of public utility, and, therefore, when property is taken for that object, it is taken for public use. So, in the case of a public road, the ground of the rightful assumption is public use. If, in the former case, compensation must be made, as we have held, so in the latter case. I see no difference, so far as the principle is concerned, between a common highway and a rail road. The former is, no doubt, more unequivocally for the public use than the latter, and that is all. Still, I propose to state again the grounds and the authorities upon which our decision rests.

[1.] It is not to be doubted but that there are cases in which *private property* may be taken for a public use, without the con-

sent of the owner, and without compensation, and without any provision of law for making compensation. These are cases of urgent public necessity, which no law has anticipated, and which cannot await the action of the Legislature. In such cases, the injured individual has no redress at law—those who seize the property are not trespassers, and there is no relief for him but by petition to the Legislature. For example: the pulling down houses, and raising bulwarks for the defence of the State against an enemy; seizing corn and other provisions for the sustenance of an army in time of war, or taking cotton bags, as Gen. Jackson did at Orleans, to build ramparts against an invading foe.

These cases illustrate the maxim, *salus populi suprema lex*. Per Buller, *J. Plate Glass Co. vs. Meredith*, 4 T. R. 797. *Noy's Maxims*, 9th. ed. p. 36. *Dyer*, 60, b. *Broom's Maxims*, 1. 2 *Bulst.* 61. 12 *Coke*, 13. *Ib.* 63. 2 *Kent's Com.* 338. 1 *Bl. Com.* 101, note 18, by Chitty. Extreme necessity alone can justify these cases and all others occupying the same ground.

[2.] This rule of necessity has a very narrow application, and is an exception, indeed, to the general rule, which is, that when public necessity or utility requires the assumption of private property, it can only be done by the act of the Legislature, and the Legislature must make provision for compensation. If it does not, the Courts may pronounce the law a nullity.

[3.] This was the law of the land in England, before Magna Charta. Against the contrary the great Charta guarded, by declaring that no individual should be deprived of his property, but by the law of the land, and by judgment of his peers. The petition of rights affirmed the same doctrine; and this great rule of right and liberty was the law of this State at the adoption of the Constitution. It is not, therefore, necessary to go to the Federal Constitution for it. It came to us with the Common Law—it is part and parcel of our social polity—it is inherent in ours, as well as every other free government. At Common Law, the Legislature can compel the use of private property, but not arbitrarily. It treats with the citizen, as owner, for the purchase, and whilst he cannot withhold it upon offer of compensation, they cannot seize it without such tender. The Legislature, says

Blackstone, interfered, "not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual, for an exchange. All the Legislature does, is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exercise of power which the Legislature indulges with caution, and which nothing but the Legislature can perform." *Black. Com. vol. 1, p. 139.* The British Parliament have frequently recognized this doctrine of the Common Law. For example: in the Highway Acts of 13 *George III. and 3 George IV.* the surveyor of highways is required to offer the owner of the soil over which a new road is to pass, a reasonable compensation, which if he refuses to accept, the Justices shall certify their proceedings to some general quarter sessions, who are required to impanel a Jury to assess damages within a given limit. *Black. Com. 101, note 19, by Chitty.* Indeed, it may be safely asserted, that the British Courts, acting in obedience to their ancient constitutions of government, have, in rare instances, except in the cases of urgent necessity above referred to, recognized the right of the State to assume private property without providing for a just compensation. The principle is admitted by the ablest writers, as being founded in natural equity and of universal application. *Grotius, De Jure B. & P. b. 8, ch. 14, §7. Puffendorff de Jur. Nat. et Gent, b. 8, ch. 5, §7. Bynhershock's Quest. Jur. Pub. b. 2, ch. 15. Vattel, b. 1, ch. 20, §244. Heinic. Elem's Jour. et Nat. b. 2, ch. 8, §170. 2 Kent's Com. 339. Story on the Constitution, §1784. 2 Johns. C. R. 162. 5 Miller's Lou. R. 416. 3 Howard, 240. 26 Wend. 497. 1 Bald. C. C. Reports, 205. 11 Peter's R. 638, 641, by Story, J.*

This great and indispensable rule of property is embodied in the Code Napoleon, (*art. 545,*) in the constitutional charter of Louis XVIII, (*2 Kent's Com. 340, note,*) in the Civil Code of Louisiana, (*art. 489,*) in the Constitution of several of our States, in the bill of rights of others, and in the Constitution of the United States. *Article 5th of Amendments to the Constitution of*

the United States. It has been recognized in Turkey, according to Mr. *J. Waties*, in *Lindley et al. vs. Commissioners*, (2 Bay. R. 60,) upon the authority of *DeToll's Memoirs of the Turkish Government*. The Constitution of the United States upon this point, I know, has been held to be a restraint upon federal legislation alone, and not to apply to the States. If that be admitted, yet it is still authority, most significant, for the application of the rule in the States. It is the affirmation of the rule in the most solemn form. It is the declaration of the opinion of the American people, that the governmental right of appropriating property, is subject to that limitation. In creating a government of limited and merely delegated powers, with a careful vigilance over the rights of the people, as derived from the Common Law—the great charter and petition of rights—it was a matter of commendable caution, to embody this limitation in the Constitution. Mr. *Story* says, that this article of the Constitution “Is an affirmance of a great doctrine established by the Common Law, for the protection of private property.” *Story's Com. vol. 3, §1784.* Upon *his* authority then, it is a Common Law doctrine. Nor does he stand alone, for such is the concurring opinion of the British and American books. Now, it would be weak reasoning to say, that because the people of the States have denied to the Federal Government the right to assume private property for public use without compensation, they have thereby conceded it to the State Governments. The contrary inference is irresistible, to wit: that the people, feeling protected in the States by this limitation on the power of the State Governments, were induced to make sure of the same protection from the Federal Government, and that the fifth article of the amendments to the Constitution is to be held and taken as a solemn avowal, by the people, that a power to take private property, without compensation, does not belong to any government. *Per Ruffin, Ch. J. 2 Dev. & Batt. 460. 3 Kelly, 31. Ib. 333. 6 Ga. Rep. 130. 9 Ib. ante, 37. 20 Johns. R. 106.*

In 1796, the Supreme Court of South Carolina were divided upon the question, whether the State could assume private property for the purpose of a highway, without compensation.

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Judges *Grimke and Bay* holding that it could—analagising the power to lay out and open roads, streets, &c. to the taxing power. Judges *Burke and Waities* dissenting. The analogy between this and the taxing power does not hold. All property is held subject to an *equal* burthen of taxation. Each citizen is presumed to pay, and ought, in fact, only to pay his equal proportion of taxes needful for the support of the government. If private property is taken to build a road, and no compensation is awarded, then the burthen of providing roads for the public, falls with onerous inequality upon those citizens over whose lands the roads happen to run. They pay their proportion of the general taxes, and of those raised to defray the expenses of opening roads, and in addition they give up their lands for the right of way. There is no equality, no justice in this. The sovereign right to lay and collect taxes, grows out of the paramount necessities of government—an urgent necessity which admits no property in the citizen, whilst it remains unsatisfied. The right to tax is coeval with all government. It springs out of the organization of the government. All property is a pledge to pay the necessary expenses of the government; but the burthen must be equally borne. A law which raises the taxes out of one man or class of men, the balance going free, would be contrary to natural right and justice, just as a law which would constrain one or a few to pay the expenses of a highway would be; and both would be set aside as nullities. See *Doe, ex dem. Gledney and another vs. Deavors*, 8 Ga. R. 479. The argument of Judge *Waities*, in the case referred to from South Carolina, is a sufficient reply to the rather feeble opinion of his adversary colleagues. 2 *Bay*, 38. Without noticing the intermediate cases in that State, I think it may be safely said, that if this ever was the doctrine of the Carolina Courts, it is not at this day. I have referred to the case in *Bay*, the more especially because his honor, Judge *Warren*, and the Justices, *Grimke and Bay*, agree in analagising the power to open roads to the taxing power, and because it is the starting point of a series of adjudications, in that State, upon the subject. Our judicial brethren of Carolina, if one might judge from the reported cases, were not, until as

late as 1838, very well agreed upon this question. See *the case of Dawson vs. The State*, *Riley's Law Cases*, 103, and particularly *the opinion of Richardson, Justice*, which is an able review, not only of the Carolina cases, but of the whole doctrine. Up to that time it is rather hard to say what had been precisely the law of that State. I think it was, that the Legislature might assume private property for the purpose of a highway, *without compensation*, and this covered the whole ground—for if for a highway, then for every purpose of public necessity or utility. But in the case of *The Louisville, Cincinnati and Charleston Rail Road Company vs. Chappell*, determined by the Court of Errors in 1838, it appears that both the Legislature and all the members of the Court agree, that private property may be taken for public use, and the “only restriction is, that private property cannot be taken without just compensation to the owner.” I say the Legislature agree, because, in the charter of that company, they require compensation to be made. 1 *Rice's Rep.* 383. All the ruling upon this matter, in that State, prior to this case, must be considered as reversed, unless it is possible to draw a distinction in the application of the principle between a rail road and a common highway, which I must hold to be impossible. So that the Carolina Bench having corrected what, with great deference, seems to me a grave error, its authority cannot be invoked to sustain the judgment of the Court below in this case.

[4.] The damages to an individual in the assumption of his land for a highway, may be small, and in most instances are small; and it may be claimed as an obligation growing out of a proper public spirit, to relinquish them without remuneration. There are cases, though, where they may be great. But the question is not one of relative pecuniary loss and gain alone—it is one of fundamental principle. The question really is, whether property is held by rules which Courts are compelled to enforce, or at the will of the Legislature? If by the will of the Legislature, then what security is there for property? It may be said, that the security is found in the limitation of the power to works of necessity and utility, and that although the Legislature may judge, in the first instance, of the necessity and util-

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ity, yet their judgment is subject to the corrective judgment of the Courts. If the Legislature should pass a law to transfer the property of A to B, under pretext of public necessity and utility, when no such necessity or utility exists in fact, there can be no doubt but that it would be the right and duty of the Judiciary to set it aside. 2 *Peters*, 653. 3 *Yerg.* 41. 11 *Wend.* 149. 19 *Ib.* 659. 16 *Mass.* 330. 5 *Paige*, 146 to 160. 2 *Kent*, 340. But it is not settled, I apprehend, that the Legislature has not the sole right of judging of the expediency of exercising the right of eminent domain, for the purpose of public improvement: as, for example, for the purpose of a public road, to be laid out and opened, and kept up by the public. In the case of *Varick vs. Smith*, the Chancellor asserts for the Legislature, the sole right of judgment, in these words: "I admit, that the two branches of the Legislature, subject only to the qualified veto of the Executive, are the sole judges as to the expediency of making police regulations interfering with the natural rights of our citizens, which regulations are not prohibited by the Constitution; and, also, as to the expediency of exercising the right of eminent domain, for the purpose of making public improvements, either for the benefit of the inhabitants of the State generally, or any particular section thereof." 5 *Paige*, 160. Chancellor *Kent*, doubtless, states the true rule. The Legislature, as a general rule, have the sole right of judgment; but if it is grossly abused, as in the case above put, the Courts may review it. 2 *Kent*, 340, '41. The restraint, then, which the Courts can exert upon the will of the Legislature, would be small. One of the restraints upon bad legislation in this regard, is the price which the people have to pay, by taxation, for the private property which is taken for public use. It is not reasonable that the Legislature will abuse the power, when their constituents pay for the right of way; but if it may be taken without compensation, then, practically, property is held at the will of the Legislature. Under our State Constitution, the General Assembly has power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to the State Constitution. *Prince*, 905. This is a broad grant.

It is limited expressly by the State Constitution, and necessarily, by the Federal Constitution, and by certain great fundamental principles not embodied in either. But suppose the principle of compensation for private property be held not to be one of those fundamental principles, then, under the Constitution, in relation to the assumption of private property, there is no limitation but the opinion of the Legislature, as to what may be necessary and proper for the good of the State. The necessity or utility of a road or other improvement, will depend upon the question, whether, in the opinion of the Legislature, it is necessary and proper for the good of the State? What is for the good of the State—what corporations, grants, privileges—how much and how often private property may be taken? are inquiries which open to the Legislature a field of discretionary power, almost without bounds—a discretion which places the sacred right of property very much within their control—a discretion which no wise people will tolerate. If the progression of this age requires the frequent exercise of the right of eminent domain, the necessity of right and liberty require, that the citizen be paid when he is injured by it; and this Court is here to see to it that he is paid. The right of accumulating, holding and transmitting property, lies at the foundation of civil liberty. Without it, man no where rises to the dignity of a freeman. It is the incentive to industry, and the means of independent action. It is in vain that life and liberty are protected—that we are entitled to trial by Jury, and the freedom of the press, and the writ of *habeas corpus*—that we have unfettered entails, and have abolished primogeniture—that suffrage is free, and that all men stand equal under the law, if property be held at the will of the Legislature.

[5.] Our judgment, therefore, is, that the injunction be granted, so far as relates to that part of this road which is laid out over the unenclosed lands of the complainant. The law ought to be so amended, as to provide for compensation in such cases, and no doubt will be at the next session of the Legislature, and the attention of the General Assembly is respectfully invited to the subject.

The motion for the injunction as to the enclosed lands, was

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sought to be sustained upon several grounds, all of which were properly overruled by the presiding Judge. First, it is assumed in the argument, that the provision for compensation in the Act of 1799, relates only to roads which had been before that time laid out and opened; that having no prospective operation, there is no law providing compensation for new roads laid out over enclosed grounds, and, consequently, none for compensation in this case. Such is not our construction of the Statute. The language of the Act is, "When any person or persons shall feel him or themselves aggrieved, by reason of any road *being laid out* through his, her or their enclosed grounds," &c. &c. Being laid out is not to be understood in the past tense, in the sense of having been laid out, but in the present tense, in the sense of being now laid out, and, applies to all roads in process of being laid out at any time. This is too plain to require farther notice.

[6.] Again, the injunction was asked upon the ground, that the Inferior Court, acting for the public, had no right to take the land of the complainant, *before and until* a just compensation had been made. The authorities ~~agree~~ ^{mainly} in this, that the compensation, or offer of it, must ~~precede~~ or be concurrent with the *seizure and entry upon* the ~~property~~ to construct the road. *Thompson vs. Grand Gulf R. R. & Banking Co.* 3 *Howard's Miss. Rep.* 240. *Lyon vs. Jérôme*, 26 *Wend.* 497. *Bonaparte vs. C. & A. R. R. Co.* 1 *Bald. C. C. U. S. Rep.* 205. 2 *Johns. Ch. R.* 162. 5 *Miller's Louisiana Rep.* 416. *Kent's Com.* 340, *note*. In *Younge vs. McKenzie, Harrison et al.* (3 *Kelly*, 45,) this Court hold the same rule, and say, "We do not intend to say, that the company could not have entered upon the land, made the necessary survey and examination of the premises, under the authority of the Legislature, for the purpose of locating the eastern abutment of the bridge; but we do intend to say, the company had no authority to appropriate the private property of the defendants to the *permanent and exclusive use* of the company, until just compensation had first been made therefor, in the manner pointed out by the charter." By this ruling, which is in accordance with the doctrine laid down by *Kent, Walworth, the Mis-*

Mississippi Court, and other authorities last referred to, the property cannot be permanently and exclusively appropriated until compensation is made or offered; that is, it must be made or offered before or contemporaneously with the seizure and entry upon the land; but the Court or its agents may enter upon the land to review it, with the object of determining upon the practicability and utility of the road. They may do more—they may, upon the report of the reviewers, order the road to be opened, before making or offering compensation, because this is not an actual seizure of the land—it is not a permanent and exclusive appropriation of it. Now this, by the statements of the bill, is all that the Court has done in this case. They appointed the reviewers, heard their report, and ordered the road to be opened. It charges farther, only, that complainant fears that the commissioners will proceed to open the road.

[7.] But apart from this view of the matter, according to his own showing, the complainant is not entitled to relief. Under the Act of 1799, the Court is not in laches, and he is. That Act provides, that any person aggrieved by a road being laid out over his enclosed grounds, may apply, in writing, to any two or more of the Justices of the Inferior Court, whose duty it shall be to issue a warrant, and cause a Jury to be impaneled to assess his damages. He has made no such application—he has not complied with the law. *Non constat*, that the Court refuses to pay the damages, but we are left to infer, that as sworn officers, they will do their duty and pay them, when he comes forward to ask, and a Jury has assessed them. The law offers the compensation if he asks it. If he does not, he is presumed to be satisfied. He has an ample remedy at Law. At this moment the Court have not, because they have not seized the land, put themselves in a position to be enjoined. Notwithstanding all this, he claims equitable relief. Let him go and demand the assessment, as the Statute directs, and if the Court refuse to issue a warrant to impanel a Jury, or do, or fail to do anything which is in violation of the law, and they or their agents then seize his lands to open the road, Chancery will, no doubt, listen to his complaint.

[8.] Again, the injunction is claimed because the reviewers appointed by the Court were not impartial but interested persons. The specification as to one, who by the by it is admitted in the bill did not sign the report, is, that he keeps a grog-shop on the line of the new road, and his custom would be increased by opening it. We cannot presume partiality from these facts. As to the other two, it is charged, that one has but recently come into the County, and signed the petition for the new road—the other was a main agent in getting up the petition, and also signed it. The road cannot be arrested on these grounds. The law directs, that the Court appoint three discreet and proper persons, residing in the neighborhood where the road is intended to pass, to make the review. We are to presume that they are discreet and proper persons, until the contrary appears. An interest, to disqualify them, must be shown to be an immediate, direct interest in the laying out the road, as distinguished from that general interest which each citizen has in a highway. There is no charge of fraud or collusion.

[9.] It is also charged, that it does not appear from their return, that they were sworn. The law requires them to be sworn, and it were better that that fact should appear on the return. The bill does not charge that they were not sworn. In Equity, without such allegation, complainant is not entitled to relief on that score.

Let the judgment be reversed, and the motion for the injunction be granted, so far as that part of the proposed road is concerned which is laid out through the unenclosed lands of the complainant.

No. 67.—SAMUEL HARRISON, administrator, &c. and another, plaintiffs in error, *vs.* EDWARD B. YOUNG and another, defendants in error.

- [1.] On an appeal to the Superior Court as to the amount of damages assessed by appraisers appointed by the Inferior Court, under a special Statute, the party originally moving in the case below, is entitled to open and conclude.
- [2.] Proof of seven years' regular and uninterrupted usage of a public ferry in this State, is *prima facie* evidence of a prescriptive right.
- [3.] A grantee, in this country, takes nothing by implication, but is confined to the terms of his charter.
- [4.] The value of land taken for public use, is not restricted to its agricultural or productive qualities, but inquiry may be made as to all other legitimate purposes to which the property could be appropriated.
- [5.] Grants to lands on water-courses from the State, *with the appurtenances*, convey no right of *public ferry*. The right of *private ferry* passes with the fee; and for any interference with this, the owner is entitled to compensation.
- [6.] An appeal to a Special Jury, under the Act of 1837, incorporating the Irwinton Bridge Company, carries nothing but the question of damages.
- [7.] Where testimony is suffered to go to the Jury without objection, and no effort is made to withdraw it from their consideration, it is too late, after the argument has closed, to call upon the Court to charge the Jury that it was illegally admitted.

Appeal from an award, in Randolph Superior Court. Tried before Judge WARREN, October Term, 1850.

By an Act of the General Assembly, passed in 1837, incorporating the Irwinton Bridge Company, for the purpose of erecting a bridge across the Chattahoochee River, it was provided, that the board of directors might take such parcel or parcels of land as they might deem necessary for the abutments, &c. of their bridge; "and in case of disagreement between the owner or owners of said land and the board of directors, in regard to the damages or price of such land, it may and shall be lawful for the board of directors to appoint one disinterested freeholder, and the owner or owners to appoint another disinterested free-

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holder, as appraisers, and the Justices of the Inferior Court of Randolph County shall appoint another disinterested freeholder, * * * * all of whom shall be sworn, by an officer authorized to administer an oath, to make and return to said Court, a just and impartial valuation of the damages or value of the land thus required by the said corporation, and their award shall be in writing, and signed by at least a majority of the said appraisers, which shall be held and taken as a judgment for the amount against the said corporation, and shall be enforced by an execution from the said Inferior Court; and the plat of said land, with the award, shall be recorded in the said County of Randolph, in the same manner that deeds are * * * *Provided*, if either party shall think proper, he, she or they may appeal to the Superior Court of said County, and have the damages ascertained by the verdict of a Special Jury, and their decision shall be final."

Edward B. Young, and John McNab, Intendant, the assignees of the corporation, having disagreed with the plaintiffs in error as to the valuation of the land on which the eastern abutment of the bridge was situated, each party and the Inferior Court appointed an appraiser—two of whom subsequently made an award—the third dissenting. From this award the plaintiffs in error appealed; which appeal came on to be tried at the October Term of the Superior Court of said County, 1850.

When both parties had announced themselves ready for trial, Counsel for plaintiffs in error insisted that they, as plaintiffs and appellants, were entitled to open and conclude the case, and moved the Court that they should be allowed to proceed with their evidence. The Court overruled the motion, and this is the first ground of error assigned.

Counsel for plaintiffs in error then moved, as a preliminary motion, that the whole proceeding should be quashed, on the ground, that the alleged award was not the award of the three appraisers, but of only two of them—the other expressly dissenting. The Court overruled the motion, and this decision is assigned as a ground of error.

The counsel for defendants in error then read in evidence

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the Jury, a paper purporting to be the affidavit taken by the appraisers, their award, the plat of land taken for the abutment of the bridge, and the certificate of the Clerk that an appeal had been entered.

Counsel for the Harrisons then proposed to prove, "That from the 1st of January, 1832, to the 1st of January, 1840, when the bridge was completed, there was in continuous use and occupation, a ferry across the Chattahoochee river, opposite Irwinton, near the site of said bridge; that from the 1st of January, 1832, to the 1st January, 1835, this use and occupation were in one Parker, who held under one McKenzie; that from 1st January, 1835, to 1st January, 1840, the use and occupation were in Love and Iverson, who received said ferry from said Parker, and who also held under a lease from said McKenzie; that on the 14th June, 1835, said McKenzie transferred said lease to the said Harrisons, who from that time received the rents for said ferry;" from which they insisted the Jury might presume a grant from the State or the Inferior Court to such ferry. The Court rejected the testimony, and this decision is assigned as error.

They also proposed to show by proof, that they were the exclusive owners of the land, for one mile and a half above the bridge, and for one mile below; and that the erection of said bridge destroyed the value of said ferry, for which loss they insisted they ought to have compensation in damages.

The Court rejected the evidence, and this decision is assigned as ground of error.

Counsel for plaintiffs in error then proposed to prove the value of the land set apart as aforesaid, for the use of an abutment for such a bridge as the Irwinton Bridge; that is, its value as a bridge site. The Court rejected the evidence, and this decision is assigned as a ground of error.

Counsel for plaintiffs in error then requested the Court to charge the Jury, "That they should find no verdict, which could vest in said Young any title to said land, because there was no evidence before them, going to show that he had complied with the terms imposed on him as a condition precedent to the vest-

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ing in him of any title to said land; and further, that the paper read to them by counsel for Young, purporting to be an affidavit, award, &c. was not to be considered by them as evidence in the case—the same not having been proved to be what they purported to be.”

The Court refused so to charge, but on the contrary did charge, “That it was the duty of the Inferior Court, before the appointment of said appraisers, to have seen that all the preliminary steps necessary to said appointment had been taken—and the presumption of law was, that they had been so taken, until the contrary appeared; and if the Jury believed, from the paper read to them, and upon which the appellants had entered their appeal, that said appointment of appraisers had been made by the Inferior Court, it was sufficient for the assessment of damages before them.”

To which charge and refusal to charge, plaintiffs in error excepted, and have assigned the same as grounds of error.

BENNING, for plaintiffs in error.

H. HOLT, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

I do not propose, on the present occasion, to review any of the doctrines held by this Court, when these parties were last before us, in January, 1849. See 6 *Ga. Rep.* 130. We see no reason to change or modify any of the principles then enunciated. Moreover, we agree with the counsel for the plaintiff in error, that the questions made by the record, are entirely new, and uncontrolled by any previous adjudications which we have made. It is true, that the argument which has been submitted by Col. Benning, controverts some of the positions which we endeavored to establish in the previous case. His bill of exceptions, however, steers clear of them, and we are content to address ourselves exclusively to that.

[1.] *The Act of 1837, incorporating the Irwinton Bridge Com.*

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pany, provides that if either party shall think proper, they may appeal to the Superior Court of Randolph County, and have the damages assessed by the appraisers, for the land taken for the eastern abutment of the bridge, ascertained by the verdict of a Special Jury. An appeal was entered in this case by the owner of the land, and the first error complained of is, that the presiding Judge held, that the opposite party was entitled to open and conclude.

The corporation brought this case into Court. They were the movants or actors, and the appeal does not change the relation of the parties as they originally stood. The damages in this, as in all other cases of appeal, have to be assessed, *de novo*, upon the evidence produced before the Special Jury. On this point, then, we think the judgment of the Circuit Court was correct, and ought to be affirmed.

A preliminary motion was made by the Harrisons, to quash the whole proceeding, upon the ground that the award from which the appeal was entered, by a majority only of the appraisers, and not by the whole number. Counsel waives this objection, on account of a decision already rendered at this term, in the *mandamus* case between *Bell and Strange*, covering this exception.

[2.] Counsel for the appellants offered to set up a title, by prescription, to their ferry over the Chattahoochee river; that the Harrisons, and those under whom they claimed, had been in the continuous and uninterrupted use of this public easement, since the year 1832, and they claim compensation for this disturbance of their franchise.

There is no doubt that seven years' uninterrupted user of this ferry, would be *prima facie* evidence, at least of a prescriptive right. Proof of a regular usage for twenty years in England, (in this State seven,) not explained or contradicted, is that upon which many private and public rights are held, and sufficient for a Jury in finding the existence of an immemorial custom. 2 *Barn. & Cres.* 54. 2 *Saund.* 175, *a. d.* *Peake's Ev.* 336. 2 *Price's R.* 450. 4 *Id.* 198. Every such claim is good if, by possibility, it might have had a legal existence. 1 *Term. Rep.* 667. And Lord

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Kenyon is reported by Lord *Ellenborough*, in *Johnson vs. Ireland*, (11 *East*, 284,) to have said, that he would not only presume one, but one hundred grants, if necessary to support such a long enjoyment.

But the difficulty here is, that the commencement of the user runs back only to 1832, which is within less than seven years of the time when the charter for this bridge was granted by the Legislature. The party, therefore, cannot claim title by prescription, and the Court was right in rejecting the evidence.

[3.] Had the proof been sufficient to sustain this prescriptive claim, we understand the constitutional doctrine to be now well settled in this country, that a grantee takes nothing by implication; and the right set up by the *Harrisons*, not being *exclusive* in its terms, the subsequent charter conferred on the *Irwinton Bridge Company* did not impair their ferry franchise. *Charles River Bridge vs. Warren Bridge et al.* 11 *Peters' Rep.* 420.

[4.] Counsel for the *Harrisons* then proposed to prove the value of the land seized and occupied by the company as a bridge site, and that the land for the western abutment cost the company \$6000, and that the location on the eastern side of the river was worth equally as much, and insisted that the value of the land for this and all other legitimate purposes, was proper to be submitted to the Jury, to enable them to estimate correctly the damages to be paid by the company. But this the Court refused, and restricted the evidence to the actual value of the land for its agricultural and productive qualities.

When land or any other property is taken for public use, the owner is entitled to compensation for its whole value;—not for this or that particular object, but for all purposes to which it may be appropriated. Suppose I have on my premises a waterfall, admirably adapted to machinery, and a portion of my land is seized and applied to the erection of a bridge or the construction of a railroad, so as to render the water-power unavailable; in computing my damages, ~~ought not~~ this fact to be taken into consideration? The value of land or any thing else, is its price in the market. Concede, then, that the right to erect this bridge is not in the *Harrisons*, but has been bestowed by the State

upon this company, ought not the owners of the land to be paid for the worth of the site to the company? Who, in making investments of capital in real estate, is not influenced by the consideration, that it will be valuable for a town, bridge, ferry, mill, manufacture, &c.? We hold, therefore, that our brother *Warren*, who ruled this case below, was mistaken as to the law which regulates this branch of the investigation.

[5.] But this is not the only injury for which the *Harrisons* are entitled to compensation. They hold under grants from the State, all the land for several miles on the stream, above and below the bridge. And while we distinctly repudiate the proposition, that these grants carry with them, as an *appurtenance*, the privilege of keeping a public ferry, we admit that they take under it a right of private ferry for themselves and their families. This incorporeal hereditament passes with the conveyance of the fee, *cum pertinentiis*. So far as the bridge then, by its location, interferes with this right, the proprietors are entitled to remuneration. If there was but one crossing place, and that was occupied by the bridge, so as to force the owners of the adjoining lands to pay toll, the detriment would be aggravated. As it is, they are entitled to be paid for the disturbance to their right of crossing the river at any point within their grants, if, indeed, any injury or inconvenience has resulted therefrom. This interest, feeble as it may be, may justly be considered as matter of value to the owners, and to any other party who may become the purchasers under them. If the Act of incorporation had never passed, the owners would never have been dispossessed. It is but right, therefore, that the beneficiaries under it, should make "just compensation" for every interest, however infirm it may be, which the owners have lost by reason of the passing of the Act.

Counsel for the *Harrisons* requested the Court to charge the Jury, that they could find no verdict for the company, which would vest in ~~them~~ the title to the land in dispute, because there was no evidence to show that they had complied with the terms imposed by their charter, as a condition precedent to any right to be acquired under the Act of incorporation; and further, that

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the notice, affidavit, award, and other papers before them, were not to be considered as evidence, for want of proof of their execution.

The Court refused to charge as requested, but, on the contrary, instructed the Jury, that it was the duty of the Inferior Court to see that the law had been complied with, as to all these preliminary matters, and the presumption was that the Court had discharged its duty.

There are two questions presented in this part of the record—

[6.] 1st. What did the appeal bring up to the Superior Court? Certainly not the whole record, upon the law as well as the facts, as in ordinary cases of appeal, but solely the measure of damages, as found by the appraisers. If the party is aggrieved as to any misdirection as to the law, he must seek redress by *certiorari*, or in some other way. And the Judge was right in holding that the appellants were precluded from going into any inquiry of this sort, upon the issue before the Special Jury.

[7.] 2d. Is it regular, after testimony has been submitted to the Jury without objection, and no effort made to withdraw it from their consideration, to call upon the Court, after the argument has closed, to charge the Jury, that they cannot pass upon it, because it has been illegally admitted? We think not. And this case illustrates, most strikingly, the impropriety of such a practice. The complaint is, that certain papers were suffered to go to the Jury, without proof of their execution. Had this objection been made and sustained at the proper time, the evidence could probably have been supplied. Taken when it was, no argument could be heard as to its competency. It came, therefore, too late.

But again we say, that this matter was not open at this stage of the proceeding—the amount of the damages being the only question that was put in issue by the appeal.

Judgment reversed.

No. 68.—WILLIAM A. BEALL, Treasurer, &c. plaintiff in error,
vs. THE STATE, *ex rel.* C. B. STRANGE, defendant in error.

- [1.] When a public trust or duty is required to be done by a *definite* number of persons, a *majority* of that definite number may act: as, where five commissioners were appointed by the Inferior Court of Marion County, to assess the depreciation of property in the town of Tazewell, caused by the removal of the county site therefrom: *Held*, that three commissioners being a majority of the five, were competent to act and make the assessment.
- [2.] When a special jurisdiction is conferred by the Legislature on commissioners, for the purpose of ascertaining certain facts, which they are required to certify, and they do so certify, their certificate is the evidence of their judgment, and is as conclusive as any other judgment upon the particular question submitted to them—it appearing upon the face of such certificate, that they acted within the jurisdiction conferred upon them by the Statute.
- [3.] When the Legislature declares, that a certificate of certain commissioners, certifying that a particular sum of money is due an individual in consequence of the depreciation of his property by the removal of a county site, shall become a debt against the County Treasurer of such County, no order of the Inferior Court is necessary to authorize the County Treasurer to pay it.

Mandamus, in Marion Superior Court. Tried before Judge ALEXANDER, September Term, 1850.

In 1847, the General Assembly passed an Act (among other things) to remove the county site of the County of Marion, from the town of Tazewell, to provide for the location of a new site, &c. By the 7th section thereof it was enacted, “That the Justices of the Inferior Court of Marion County shall appoint five other commissioners, whose duty it shall be to ascertain the value of the town property in the town of Tazewell, (the same to be fixed at the amount the owners thereof placed upon it in the returns of their taxable property for the year 1847,) and then assess the amount of depreciation of said town property, because of the removal of said county site; and the said commissioners shall execute to the owners of said town property, a certificate, declaring the damage thus sustained, which said certificate shall become a debt against the County Treasury of said County; and

such certificate shall be received in payment for any contract for the purchase of any lot or lots in the new county site," &c. The Act also provided, that these certificates should be *first* paid out of the proceeds of an extra tax authorized by the Act.

Charner B. Strange applied for a mandamus against Beall, the County Treasurer, alleging that three of the commissioners appointed under this Act, had assessed the damage on property owned by him in the town of Tazewell, at \$1782 88, and had executed and delivered to him a certificate, as required by the Act; that there were funds in the Treasury liable for the payment of the certificate, and that the Treasurer refused to pay the same.

In response to the mandamus *nisi* granted by the Court, Beall returned, among other grounds, why the mandamus should not be made absolute—

1st. That the Act of the Legislature did not authorize *three* commissioners to act in the premises, without the concurrence or presence of the whole number authorized to be appointed by said Court.

2d. That respondent had heard and believed, that the three commissioners aforesaid who signed the certificate, convened together, determined and assessed the damage, and gave the certificate without the knowledge, consent or assent of the other two commissioners.

3d. That the certificate *given* to Strange does not describe the property claimed by said Strange, and upon which damages were assessed.

And because the respondent had been informed and believed, that the commissioners did not require said Strange to exhibit any title whatever to said property; nor did they inquire into the title to said property, previous to or at the time they made and delivered said certificate.

And lastly, because the Inferior Court of said County had passed no order authorizing the respondent to pay said claim out of any funds in his hands belonging to said County.

Upon demurrer to the sufficiency of these grounds, the Court

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sustained the demurrer, and held that the same were insufficient as answers to the mandamus nisi.

Upon this decision error has been assigned in this Court.

BENNING, for plaintiff in error.

B. HILL and WORRELL, for defendant.

By the Court.—WARNER J. delivering the opinion.

[1.] The first ground of error assigned to the judgment of the Court below is, that only three of the commissioners appointed in pursuance of the Act of the Legislature, assessed the plaintiff's damages, and granted the certificate to him. The 7th section of the Act authorizes the Justices of the Inferior Court of Marion County, to appoint five commissioners, whose duty it shall be to ascertain the value of the town property in the town of Tazewell, and then to assess the amount of depreciation of said town property, because of the removal of the county site therefrom. The Act also provides, the said commissioners shall execute to the owners of said town property, a certificate, declaring the damage thus sustained; which said certificate shall become a debt against the County Treasury of said County. The Act having appointed a definite number of commissioners to assess the damages and grant the certificate, was it competent for three of the commissioners to act? or was it indispensably necessary that the whole number of the commissioners should have been present?

The general rule in regard to corporations is, where an act is required to be done by a definite number of persons, that a majority of that definite number may act. *Angel & Ames on Corporations*, 397. 2 *Kent's Com.* 293. *Ex parte Wilcox*, 7 *Conn's Rep.* 409.

We understand the general rule of law to be, that when a public trust or duty is to be executed by a definite number of persons, such public trust or duty may be executed by a majority of that definite number. *Blacket vs. Blitzard*, 17 *Conn. Law Rep.* 509. Here, five commissioners were appointed to make the assess-

ment, and three of them having made it, being a *majority* of the five, the assessment, in our judgment, was legally made by them, and, therefore, affirm the judgment of the Court below, as to that assignment of error.

The second ground of error taken is, that the three commissioners who made the assessment, did so without the knowledge or consent of the other two commissioners.

This objection is necessarily embraced in the first ground of error; for we have just ruled, that it was competent for three of the commissioners, being a *majority* of the five appointed, to meet together and make the assessment; and however desirable it may have been for all the commissioners to have had notice, and been present when the assessment was made, yet, in the view which we have taken of the question, such notice and presence was not indispensably necessary to the validity of the certificate of assessment executed by the *majority* of the commissioners.

[2.] The third and fourth grounds of error may be considered together. The respondent (the County Treasurer) insists, that the certificate given to the plaintiff, (Strange,) does not describe the property claimed by him, upon which the damages were assessed; and he also insists, that the commissioners did not require the plaintiff to exhibit any *title* whatever to the property on which the assessment was made; nor did they inquire into the title to said property. The answer to these objections is, that the Legislature thought proper to confer upon the commissioners the power and authority to assess the amount of depreciation of town property in the town of Tazewell, caused by the removal of the county site, and to execute to the *owners* thereof a certificate, declaring the damage sustained, which the commissioners have done, under oath, as prescribed by the Statute. It appears from the *face* of the certificate, that the commissioners have acted in the matter, as required by the Act conferring the jurisdiction upon them, and the certificate is the evidence of their judgment, which is conclusive upon the County Treasurer, who cannot go behind that judgment, and insist the commissioners did not have sufficient evidence before them, as to the plaintiff's title to the property, to authorize them to exe-

cate to him a certificate. The commissioners state in their certificate, "That after being duly sworn, they did proceed to ascertain the value of the property in said town of Tazewell, and to assess the depreciation of the same, by reason of the removal of said county site, when it was ascertained that Charner B. Strange owned town property in said town of Tazewell, of the value of \$3,137 87, and that the same was depreciated fifty-seven per cent. by reason of said removal." This judgment of the commissioners, (having acted within the special jurisdiction conferred upon them by the Statute, as appears on the face of the certificate,) is as conclusive in regard to the facts found by them as any other judgment, and it does not lie in the mouth of the County Treasurer to question it, when called on to pay the amount of the assessment out of the County Treasury, for the Act expressly declares, the certificate shall become a debt against the County Treasury of Marion County.

[3.] The fifth and last ground of error assigned is, that the Inferior Court of Marion County had passed no order authorizing the respondent to pay the plaintiff's demand out of any funds in his hands belonging to said County.

The 12th section of the Act authorizes an extra tax to be levied, not exceeding seventy-five per cent. to be applied in the payment of damages sustained by the owners of property in Tazewell, when ascertained, as before mentioned, by the commissioners. When the plaintiff obtained his certificate from the commissioners of the amount his property had been depreciated, such certificate, certifying the amount due him in consequence of such depreciation, became, by the express provisions of the Act, a debt against the County Treasury of Marion County, and the County Treasurer was bound to pay it without an order of the Inferior Court—the sovereign authority of the State commands him to pay it.

Let the judgment of the Court below be affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT MACON,

FEBRUARY TERM, 1851.

Present—JOSEPH H. LUMPKIN, }
HIRAM WARNER, } Judges.
EUGENIUS A. NISBET, }

No. 69.—JOHN FOX, plaintiff in error, *vs.* The State of Georgia,
defendant.

[1.] A defendant in a criminal cause at the second term applies for a continuance, setting forth that a material witness was absent—that he had been subpoenaed at the first term and recognised to appear, and that his expenses in attending the Court had been tendered to him, and that he expected to prove by him that he had heard a witness, upon whom he (the defendant) understood the State would mainly rely for a conviction, say “that if hard swearing would send the defendant to the penitentiary, he should go:” *Held*, that the showing was sufficient.

[2.] It is not competent for the Court to refuse a continuance, after a legal showing, upon the ground of the Court’s private knowledge of the good character of a witness sought to be impeached by the testimony of the absent witness, on account of whose absence the continuance is asked, and the Court’s want of confidence in the integrity of the party moving the continuance.

Fox vs. The State.

Indictment for larceny from the house, in Bibb Superior Court. Before Judge STARK, July Term, 1850.

At the July Term, 1850, of Bibb Superior Court, John Fox was placed on his trial for larceny from the house. The defendant moved for a continuance for the absence of a witness, William Robards, who resided in Decatur County.

On the showing for a continuance, it appeared that the witness had been recognized at the last term of the Court to appear and testify in the cause for the defendant. The defendant stated that he expected to prove by the witness, Robards, that he (witness) heard one Simpson, upon whose testimony the defendant understood the State would mainly rely for conviction, say "that if hard swearing would send the defendant to the penitentiary, that he should go." The defendant further stated that he had made efforts to procure the testimony of the witness, and defendant's counsel stated that while he was in attendance upon Decatur Court, he sent word to the witness that if he would attend Bibb Court, the defendant would pay all his expenses.

On his cross-examination, the defendant stated that Simpson had lived in Macon two years. Did not know whether Hughes, Bishop or Smith were present and heard the conversation between himself and Robards, but supposed they might have heard it. Robards was confined in jail at the time of the conversation, charged with stealing a horse and buggy.

The application for a continuance was made on Monday of the second week of the Court. No application had been made to the Court to send for the witness, for the reason, counsel stated, that he expected the witness to be present at the trial, and proposed that the case be postponed until the witness could be sent for, which would require four days only. The Solicitor General proposed to admit upon the trial that Robards would swear what the defendant had stated he would prove by him; which was declined by defendant's counsel. The motion to continue was overruled by the Court, and the trial ordered to progress.

The Jury returned a verdict of guilty. Whereupon, counsel

for defendant moved the Court for a new trial, on the ground that the Court erred in refusing to grant the continuance. The Court overruled the motion for a new trial, and remarked "that in overruling the defendant's showing for a continuance, he did not place much confidence in the truth of the defendant's statements—knowing, as he had, for many years, the witness, Simpson, whose testimony was sought to be assailed, and having no special reason to confide in the integrity of Fox, he thought if a witness intended to act out the corruption ascribed to Simpson, he would not be likely to declare his intentions in advance in the presence of others, and the facts disclosed on the trial left his preconceived opinions of the integrity of Fox unchanged."

Counsel for the defendant excepted.

DEGRAFFENREID, for plaintiff in error.

Sol. Gen. McCUNE, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The new trial ought to have been granted, because there was error in not allowing the continuance. The plaintiff in error had used diligence to procure the attendance of his witness. He had been subpoenaed—had been even recognized to appear; he had, through his counsel, tendered to the witness his expenses, and the testimony was material. The party swore that he expected to prove by the absent witness that he heard Simpson, the witness upon whom he understood the State would mainly rely for a conviction, say "that if hard swearing would send the defendant to the penitentiary, he should go." It does not appear that any other witness would prove the same thing. The testimony of the absent witness, then, was wanted to impeach the credibility of a witness upon whose evidence the defendant understood the State mainly relied for a conviction. All proper diligence was used to have the witness at the trial. It is clear that the showing for a continuance was complete.

[2.] Why, then, was it not granted? It appears from the re-

cord before me, that the presiding Judge gave as reasons for refusing the new trial, that he did not place much confidence in the truth of the defendant's statements. "Knowing, as he had (in the language of the Judge) for many years, the witness Simpson, whose testimony was sought to be assailed, and having no special reason to confide in the integrity of Fox, the defendant: If a witness intended to act out the corruption ascribed to Simpson, he would not be likely to declare his intentions in advance, in the presence of others, and the facts disclosed on the trial left his preconceived opinions of the integrity of Fox unchanged." Here, then, are the reasons which influenced the mind of the Judge, in refusing the continuance. They are not only not sufficient, but develop a ground of action in such cases not warranted by the law. Both the application for the continuance and for the new trial were, it is true, addressed to the sound discretion of the Court. But the discretion in such cases cannot override a clear legal right or dispense with a plain rule of law. If the defendant was by law entitled to the continuance, the Court had no discretion to refuse a new trial. The right to a continuance gave him the right to a new trial. There was, as we have seen, no legal objection to the showing for a continuance. Can the Court, when the showing is sufficient, refuse it on account of his personal knowledge of the character of the party making it, and of the witness whose testimony that party is seeking to assail—a knowledge not drawn from evidence before the Court, but from his private sources of information? He, beyond all controversy, cannot. He has no discretion to act upon such knowledge. The discretion allowed in applications for a continuance must be within the law, and must spring out of, and be bounded by what transpires in the case. It cannot be justified upon what the Court, as a man, may or may not know. Justice is administered according to general rules; rules which, if applicable in a single case, must be applicable in all like cases, no matter who are the parties, or what their character. If the Court may dispense with them because of his personal knowledge of the character of the parties before him in one case, he may in *all cases*. And this would be equivalent to dispensing with them

altogether. The rights of parties—the administration of justice—would depend then, not upon laws which are uniform and equal in their application to all men, and which are prescribed, but upon the idea which a Judge may entertain of the integrity of parties, or the purity of witnesses. It is assuming, and that too, in advance of the trial, the province of the Jury; that is, the right to pass upon the credibility of the witness. Upon the proofs at the trial, the Judge would have no right to say whether the witness, Simpson, be entitled to be believed; much less has he the right before the trial, upon a motion for a continuance, and upon his private knowledge of his character, to assume that he cannot be impeached, and upon that knowledge, coupled with a want of confidence in the integrity of the party, founded likewise on his personal knowledge of his character, refuse a continuance. We are ignorant of the character of both the witness and of the party in this case. It may or may not be true that the one is very good and the other very bad. Let it be conceded that Fox is wanting in integrity—that he is a great scoundrel—yet he is entitled to be tried by the same rules of law by which an innocent and upright man would be tried.

Let the judgment be reversed.

**NO. 70.—THE MACON & WESTERN R. R. Co. plaintiffs in error,
vs. WILLIAM B. PARKER, defendant.**

- [1.] Is a railroad subject to levy and sale, at Law? *Query.*
- [2.] For the purpose of marshaling the assets of an insolvent estate, the executor or administrator may file his bill and obtain a decree, not only for the purpose of reducing the property to money, but, also, of ascertaining the order in which the debts are to be paid.
- [3.] A Court of Equity does not, as of course, assume jurisdiction in taking executions upon judgments *at Law* into its own hands, as such power would be oppressive both to the debtor and the Court.

Macon & Western R. R. Co. *vs.* Parker.

- [4.] The presumption is, that the Court which renders a judgment is competent to enforce it, and it is only in special cases that Chancery interferes.
- [5.] Where there are sundry *fi. fas.* against an insolvent railroad company, threatening to seize and sell the road, with its equipments, extending one hundred miles in length through six different Counties, Equity will take jurisdiction of the matter, direct a sale of the entire property for the benefit of all concerned, and distribute the fund according to the practice and usage in Chancery, in a creditor's suit against executors and administrators. In such a case, no other Court but that of Chancery possesses adequate jurisdiction to reach and dispose of the entire merits.
- [6.] To allow the road to be cut up into fragments, and separate portions sold at different sales, in the different Counties through which it passes, to different purchasers, would not only sacrifice the rights and interests of creditors, but defeat the objects and intentions of the Legislature in granting the charter.
- [7.] The powers of Equity will be invoked to aid the defects of the Law; and where the facts and circumstances of the case are novel and peculiar, analogous principles will be applied to the existing emergency.
- [8.] Any creditor who has a claim upon the fund, but who is not a nominal party to the suit, may make himself a party thereto in fact, by coming in and presenting his claim under the decree, and submitting himself to the jurisdiction of the Court for its settlement and adjustment upon the fund to be distributed.
- [9.] If he neglects or refuses to come in and entitle himself to the benefit of the decree, Equity will not assist him to set aside and annul.

In Equity, from Bibb, Decision on demurrer, by Judge STARK, at July Term, 1850.

● This bill was filed for foreclosure, account and relief, by Wm. B. Parker *vs.* the Macon and Western R. R. Co. (R. Collins, J. D. Gray, D. McDougald and E. Alexander being made also parties defendants.) It seeks to foreclose certain bonds or certificates of indebtedness to amount of \$47,500, principal, predicated on and connected, by reference, to a certain mortgage contract dated 2d August, 1842, between the Monroe R. R. & Banking Company, (whose charter, amended, is the same used by the Macon & W. R. R. Co.) of the one part, and John D. Gray and others, to wit: R. Collins, D. McDougald, E. Alexander and A. B. Davis, (the latter deceased and not represented,) of the other part.

This 2d August contract mortgages the entire road and apper-

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tenances, connected or to be connected, to said contractors, to secure payment for the work to be done, and materials supplied for said company, but especially for building and completing that part above Griffin. By said 2d August contract three-fourths of the net receipts of the entire road were also mortgaged and pledged for the like purpose.

The work was carried on, and from time to time the company's engineer certified to different sections of it, and the company accepted and ratified said portions, as per contract, and issued its *bonds* or *certificates* therefor, in divided amounts for convenience, of which the following is an exact sample of those held by Parker, to wit:

\$1,000.	Secured by Mortgage.	Three-fourths the net receipts of the Road is specially appropriated to the payment of these Bonds.
<p>This is to certify, that the Monroe R. R. & Banking Co. acknowledge to owe to John D. Gray, or bearer, one thousand dollars, for work and materials on the road; 20 per cent of which, with interest from date, shall be payable on the 1st day of October, 1844, and 20 per cent. on 1st day of October each and every year thereafter, until the whole is paid; and to secure these payments, the above road and appurtenances are specially mortgaged, as per contract, dated 2d August, 1842, duly executed and recorded: <i>Provided</i>, that the failure to pay any one of these instalments at maturity, shall not render the succeeding ones demandable before they respectively fall due, as above expressed.</p>		
<p>Macon, Ga. July 1, 1844. A. COCHRAN, Pres't. M. L. GRAYBILL, Cashier.</p>		
\$1,000.		

The 2d August contract, while it vested in the said contractors the road and appurtenances, in full title and estate, until all the *dues* and payments to which they should become entitled, under said contract, shall have been fully met and satisfied, also provided, that they should not "coerce payment any further than 75 per cent. of the net receipts of the road, until their contract should be fully completed and performed.

Parker's bill and exhibits show the foregoing facts, and then, in the "charging" part, refer to various pretences of defendant, (below,) and among other things, to a certain pretended decree under which defendant claims; and in avoidance of said supposed defences, the bill alleges, that the old Monroe R. R. & Bank's Co. being greatly embarrassed and pressed by certain of its judgment creditors, filed a bill seeking to enjoin them in behalf of the public nature of the work, but chiefly in behalf of the said contractors, Gray and others; that said bill was amended, and the prayer and the relief sought were, at the trial term in May, 1845, so changed as to ask for or suggest to the Court the plan of *selling the road*, and praying, in such event, a distribution of the proceeds among *all* its creditors of all descriptions.

At May Term, 1845, a decree was obtained, which directed a sale, by five commissioners, to be made on the first Tuesday in August, 1845, and directing advertisement for all creditors of every description, naming mortgagees, to file their claims with the Clerk of the Court, and that creditors then litigate their claims among themselves. This sale came off on 5th August, 1845, and, after some disconnected property bought by others, the *road* and all its appurtenances was bid off by one Jerry Cowles, acting as agent for one Daniel Tyler; that Tyler, in January, 1846, paid over about \$155,000, and the five commissioners gave him a deed; that Tyler deeded the same to the defendant, the Macon & Western R. R. Company—being, in truth and fact, only the agent for the persons who soon thereafter became said company.

The bill charges fraud, irregularity and want of and excess of jurisdiction, in procuring the decree of May, 1845, and notice of the whole by Tyler, through his agent, Jerry Cowles. It also charges, that Tyler, before he paid the purchase money, had notice of said irregularities, and of Parker's *lien*, and that defendant, (the company,) by Tyler, its first President, also before it paid its money, had notice of the aforesaid irregularities, and of Parker's claims and their character; that Parker was not a party to said old bill, though he went before the Court and *protested* when a motion was made to confirm and ratify the con-

missioners' report, and protested against it and all the proceedings so far as they might affect his mortgage liens; that after the money was paid by Tyler, and under the advertisement for all creditors to come in and prove their debts, various creditors did do so, but he declined and refused to go in and claim the same, or any part thereof; that on the day of sale, and at the sale in August, 1845, he was present and proclaimed aloud, so that J. Cowles and all present heard him, that he held these particular mortgages; that by reason of this notice, and notices of other liens, the road sold for much less than it otherwise would have brought.

The fraud and irregularities as specified, in part, are, that complainant's solicitor in said old bill, after the Jury were charged with the case, went into the jury room and conversed with them about their pending inquiry; that Tyler was really agent for persons at the North, who afterwards came forward as stockholders in the company, (defendants,) and it was their money and not his, that he paid for the road, and that he took the deed in his name in fraud, to have the apparent shield for the company of purchasing without notice, when they got title from him.

The bill admits that the contractors did not fully finish the road, but urges the failures of the old company as dispensing with this as a precedent duty to foreclosing on the road, and also sets up their practical waiver. It states that, as to a part of the road, Parker's are the highest liens, and that this Court has so decided. It prays, that any other certificate holders, if any, when discovered, may be made parties.

The bill then prays a foreclosure for his whole debt, either,
1st. On the entire road and its receipts; or,

2d. On that part which was built by Gray and others, under the mortgage of 2d August, 1842, and its net receipts; or,

3d. Upon the net receipts alone of the part so built: i. e. from Griffin to Atlanta.

To this bill there was a general demurrer filed by the defendant.

At the hearing, July Term, 1850, of Bibb Superior Court,

Judge *Stark* overruled the demurrer, and counsel for defendant excepted.

CHAPPELL and McDONALD, for plaintiffs in error.

S. T. BAILEY, RUTHERFORD and COLE, for defendant in error.

Brief of C. J. McDONALD, for plaintiff in error.

1st. On the sale of property under the highest lien, the purchaser takes a perfect title. He cannot be disturbed by inferior liens. *Georgia Decisions, part 2, p. 50. 2 Kinne, 201.*

2d. The bill contains no facts and data on which the Court can base a decree.

3d. The mortgage is a joint one, and all the parties thereto and all who have the right to claim as mortgagees, are necessary parties to the suit. *Story's Com. on Eq. Plead. §199, 169.*

4th. There was a condition precedent in the contract, and the bill does not show its performance.

5th. The supplement to the contract is not signed by both parties, and, therefore, binds neither.

6th. By the terms of the decree, the purchaser is protected. He was to take the property discharged of all liens and incumbrances, and the bill shows that the proceeds of sale were applied to liens which overrode his. In such case he was not a necessary party. *Sto. Eq. Pl. §639. 2 Kinne, 201.*

7th. The bill impeaches the decree under which the sale was made, and in such case it is necessary that the proceedings of that cause should be set out fully and at large. *Sto. Eq. Pl. §428. Gifford vs. Hart, 1 Sch. & Lefroy, 386. Kennedy vs. Daly, 1 Sch. & Le. 355, 374, 375.*

8th. The sale was under a decree of a Court of Chancery, which provided for complainant's coming in and claiming. He might have come in. He had notice of the decree and all its provisions, and if he refused to come in, the Court will not now lend its aid, to the injury of the purchaser. *Parson vs. Douglas, 383. 1 Brown's Ch. Rep. 171. 1 Vesey, Jr. 256, note 7. 10*

Paige's Rep. 383. 4 *Johns. Ch. Rep.* 643. 9 *Paige*, 260, 600. 1 *Sug. on Vend.* 103, §16. 12 *Eng. Com. L. Rep.* 585. 18 *Ves.* 469.

9th. Irregularity in the proceedings will not affect the purchaser. 1 *Paige's Rep.* 95, 96. 12 *Ves.* 106, also note 4.

10th. The reversal of a decree will not affect the title of the purchaser. 12 *Ves. Jr.* 89, note. 1 *Ball & Beattie's Rep.* 232.

11th. A *bona fide* purchaser under a decree fraudulently made, to whom no collusion can be brought home, will be protected. 1 *Vesey*, 567.

12th. Provisional sale may be made, and if found to be unnecessary, the purchaser will be protected. 9 *Ves.* 67, note 3.

13th. The allegation that complainant was not a party to the bill on which the decree of sale was made, is not an allegation amounting to a fraud. *Sto. Eq. Pl.* §117. 3 *Stoanston*, 284. 16 *Ves.* 328, 329. 3 *Mason, Wood vs. Dummer*.

14th. No equity in the bill—

1. The company had no power to mortgage the road, and mortgage therefore void. 3 *Rob. Lou. Rep.*

2. The contract claimed to be a mortgage, contains no provision for securing any such certificate as that held by complainant and sued on.

3. Complainant does not show at what time he became the owner of the certificate. If he purchased, *pendente lite*, he need not have been made a party. *Calvert on Eq.* 128. 3 *Stoans. R.* 144. *Story's Eq. Pl.* 179, §194. 2 *Atkyns*, 174.

The bill does not show the consideration paid by complainant for the certificates and bonds held by him, and as against a real purchaser he cannot claim more than he paid. 1 *Vernon*, 476. *Ib.* 464. 15 *Mass. R.* 505. *Ang. & Ames on Cor.* 475.

Practice of opening bidding not recognized in this country. *Daniel's Ch. Pr.* 1465.

Brief of S. T. BAILEY, for defendant in error.

When a suit is commenced against five, and the writ is served only on three, and the plaintiff takes judgment against all five,

that judgment is a lien only against those who were served. *Purdy vs. Doyle*, 1 *Paige*, 555.

In Chancery, whenever land is pledged to secure the payment of money, the conveyance is a mortgage, whatever form the conveyance takes. *Kellerand vs. Brown*, 4 *Mass.* 443.

When a vendee records and speaks of a conveyance as a mortgage, it is a circumstance to prove it a mortgage or security for money. *Oldham vs. Halley*, 2 *J. J. Marshall*, 115.

Every contract for the security of a debt, by the conveyance of real estate, is a mortgage. *Henry vs. Davis*, 7 *J. C. R.* 40.

A mortgage to secure future advances is valid and binding. *James vs. Morey*, 2 *Cow.* 247.

A mortgage is only a security for a debt, and anything which transfers or extinguishes the debt, transfers or discharges the mortgage, as an incident of the debt. *Barnes vs. Lee*, 1 *Bibb*, 526.

It is not necessary to the validity of a mortgage, that it states truly the debt intended to be secured; but it shall stand as a security for the real equitable claims of the mortgagee, whether they existed at the date of the mortgage, or arose afterwards upon the faith of the mortgage, before notice of defendant's equity. *Shiras vs. Carey*, 7 *Cranch*, 35. 2 *Con. R. U. S.* 408.

When a purchaser has notice of a mortgage before he takes a deed or pays the purchase money, he is bound by the prior lien, and is not a *bona fide* purchaser. *Beekman vs. Frost*, 18 *J. R.* 544.

If a mortgage is registered, it is notice to all subsequent purchasers and mortgagees, and there must be proof of intentional fraud to postpone or bar the mortgage. *Brinkerhoff vs. Lansing*, 4 *J. C. R.* 70.

On a bill for foreclosure by the assignee of a mortgage, it is not necessary to make the mortgagee a party—he having parted with all his interest by an absolute assignment. *Whitney vs. McKinnie*, 7 *J. C. R.* 144.

A second mortgagee may file a bill to foreclose without making the first mortgagee a party. *Rose vs. Page*, 2 *Sim.* 471.

An assignment of the mortgaged debt, without conveyance of

the legal title of the mortgaged premises, is sufficient to authorize the assignee to foreclose. *Austin vs. Burbank*, 2 Day, 474.

A mortgagee, although he has conveyed in fee the whole mortgaged premises, can yet foreclose; for his conveyance of the land does not pass his interest in the mortgage. *Wilson vs. Troup*, 2 Cowen, 195.

One of the mortgagees, to secure a joint debt, having assigned all his interest in the mortgaged premises, and the other having been paid his share, the assignee may file a bill by himself and in his own name to foreclose. *King vs. Harrington*, 2 Atk. 33. 2 V. B. H. Dig. 292.

Incumbrances not made parties are not affected by a decree, and purchasers take subject to such incumbrances. *Finley vs. Bank U. S.* 6 Cow. R. U. S. 319.

A purchaser under a sale by virtue of a decree of foreclosure, will only take title as against the parties to the suit, and he cannot set it up against those incumbrances and equities who are not parties to the suit. *Hayne vs. Beach*, 3 J. C. R. 459.

A second mortgagee may file a bill to foreclose, notwithstanding a prior sale under a decree, and the purchaser, either at private or public sale, is not protected against such incumbrances, if he had either constructive or actual notice of it, and the subsequent incumbrancer were not a party to the prior suit or decree, and he need not offer to pay or redeem the prior incumbrances, but is entitled to a sale of the premises. *Vanderkamp vs. Shelton*, 11 Paige's R. 28.

A decree against an executor, *in invitum*, unless impeached for fraud, binds the residuary legatees; but when it is by consent, it is subject to re-examination, and has no obligation unless proved to be just. *Land vs. Gatlin*, 2 Dev. & Bat. Eq. 37.

A judgment or decree binds nor protects none but those who are parties or privies to it. *Marrigault vs. Harrison*, 1 Brock. 126.

The purchaser at public sale of premises incumbered by a mortgage, purchases nothing but the equity of redemption, subject to the mortgage. *Hartshorn vs. Hartshorn*, 1 Green. Ch. R. 349.

A forfeiture cannot be taken advantage of, nor enforced against a corporation, collaterally, nor in any mode or manner, but by a direct proceeding by and in the name of the Government. *Angell & Ames on Corp.* 664.

When a decree in Equity directed lands to be sold for the benefit of creditors, and it was sold by the Sheriff under such decree, and the sale ratified by the Court of Chancery, held, that the purchaser took only the interest of such as were parties to the bill on which the decree was founded, and that the rights of others, not parties, although intended to be bound, were in no way affected by the decree and sale. *Laurens vs. Jenney*, 1 *Speer*, 356.

A person is not to be in any measure affected by a decision between others, merely because he was present at the trial and cross-examined witnesses; he must, like a party, have had a full, fair and previous opportunity to meet the question in controversy. *Turpin vs. Thomas*, 2 *Hening & Munford*, 139, 147. *Wood vs. Jackson*, 8 *Wend.* 26, 27.

One affected by a decree, but not a party, may aver and prove it was entered by an agreement of the parties, though it contradict the record. *Stark's Adm'rs vs. Thomson's Exr's*, 3 *Monroe's R.* 302.

Brief of J. RUTHERFORD, for defendant in error—

1st. *Point.* One of fact—that the first ground of error is a misstatement of the facts in the bill.

on issue on second ground of error as to

Calv. Part. 128, 138. *Story's Eq. Pl.* §193, (*midway*,) and *n.* 1, *end of sec.* 3 *Ves.* 317.

5th Point. This (third) ground is not good, because it does not point out and show who complainant has left out as parties. *Story's Eq. Pl.* §543, 238. *Mit. Eq.* 180, '81. 1 *Smith's Ch. Pr.* 203. 1 *Myl. & K.* 17, 1 *Dan. Ch. Pr.* 385.

6th Point, (4th error.) We take issue as to the fact. Then see *Batton's Eq. Con.* 87, 126. 2 *Pet.* 102. 14 *Mass.* 266.

7th Point (under 6th ground.) See *Story's Eq. Pl.* §676, §450, 33, *n.* 1, §46. The way we charge fraud will do. *Story's Eq. Pl.* §28, 251, 252.

But this is a demurrer and admits the full fact, and as stated. 2 *Dan. Ch. Pr.* 20, 12. By plea is the way to notice it. 2 *Ib.* 99, 100.

8th Point (under 6th ground.) We do not pray to set aside said decree—not necessary to do that.

9th Point (under 8th ground.) We join issue of fact, and say fraud is charged, and facts given to prove it. Then see 2 *Tidd*, 867. *Cro. Eliz.* 189, 411. 1 *Root*, 134. 3 *Day*, 219.

10th Point. Our bill specifies fraud and usurpation and excess of jurisdiction. To which see 15 *J. R.* 141. 19 *Ib.* 33. 10 *Pet. Rep.* 449. *Story's Eq. Pl.* 7. 8 *Cranch*, 9, 22.

11th Point (under 9th, 7th and 5th grounds.) First, as a creditor's bill, we say Parker was not bound to go in and claim under the decree of May, 1845. The bill says he did not. Then see 2 *Ball. & Beat.* 354, 357. *Welf. Eq. Pl.* 54. 3 *Myl. & C.* 69, 70. 1 *Dan. Ch. Pr.* 376. 2 *Sim.* 471. 8 *Price*, 518. 2 *Ball. & Beat.* 567, *n.* *Story's Eq. Pl.* §274, *a. p.* 227. *Cow. on Mort.* 379. 2 *Dick.* 707. *Tidd.* 853.

Not obligatory for even simple contract creditors to go in, and prior incumbrancers are excluded. 1 *Story's Eq.* §548. 1 *Crai. & Phil.* 48, 56. 2 *Danl. Ch. Pr.* 802, 469. 2 *Smith's Ch. Pr.* 102. Effect of not going in. 2 *Danl. Ch. Pr.* 856, 500.

The old bill treated as an assignment by insolvent. Parker not bound to go in. 1 *Dick.* 376. 1 *Coxe's R.* 422. 2 *Ib.* 378. 1 *Swanston*, 579. *Jeremy's Eq.* 250. 2 *Story's Eq.* §829, *o.* 1038. 2 *Dick.* 608. 19 *Ves.* 153. 2 *Smith's Ch. Pr.* 102.

Macon & Western R. R. Co. vs. Parker.

The assignee himself takes, subject to all equities of the insolvent. 1 *Bro. C. C.* 302. *Amb.* 724.

12th Point. Defendant (in bill) not a *bona fide* purchaser, and not entitled to protection. 1 *Dan. Ch. Pr.* 533, 911. 1 *Bli.* 169. 1 *Sch. & Lef.* 386. 2 *Ib.* 566. 3 *Mer.* 310. 14 *Ves.* 550. 6 *Beav.* 97, (two latter to point that Chancery does not warrant.) To same, 2 *Smith Ch. Pr.* 285. 2 *Sch. & Lef.* 603.

Purchaser or his vendee gets only title of defendant in the case. 6 *Dana*, 402. 1 *Green's Ch.* 348, 349.

Covenant to pay annual rents runs with the land. 3 *Wils.* 25. 2 *Story's Eq.* §1231. 4 *Ves.* 478. 4 *Bro. Ch. C.* 421. An annuity charge runs with the land. *Sug. Ven.* 372. 2 *Tuck. Com.* 452.

Defendants bound by Tyler's engagements before they bought. *Barton on Con.* 121, 198, 36. 16. 1 *Myl. & C.* 370. 3 *Ib.* 97. See 11 *Gill. & John.* 1. 4 *Kent*, 470, *n. f.* 2 *Ball & Beatt.* 354. 2 *Smith's Ch. Pr.* 211.

Master's report—what? 2 *Smith's Ch. Pr.* 185, 187. *Bennett's Pr. on Mas. Off.* 106, 168, '69, 89, 138. 2 *Ib.* 161, 211. As to purchaser not being satisfied. 2 *Ball. & Beat.* 354.

13th Point. If Parker had been a regular party, he could now object to decree for want of or excess of jurisdiction. 4 *Cowen*, 292. 9 *Ib.* 227. 1 *Ves.* 441. 2 *Kent*, 312, '13. *A. & A.* 665. And if he had gone in for the money after consenting to the sale, he, on objection, would have been rejected. 1 *Danl. Ch. Pr.* 376. 3 *Swanst.* 144, *n.*

14th Point. The Macon & Western Railroad and the old Monroe Railroad the same person, and cannot object to foreclosure.

By the Court.—LUMPKIN, J. delivering the opinion.

In 1833, the Legislature granted a charter to the Monroe Railroad Company, to construct a railroad from Macon to Forsyth. In 1835, an Act was passed amending and reviving the Act of 1833, and in 1836, another Act was passed, amending and extending the provisions of the original charter. This last Act provides, that the company may increase their stock so as to ex-

tend their road in a northwestern direction, and also confers banking privileges.

On the 2d of August, 1842, said company being greatly embarrassed and unable to proceed with their work, which was in a very imperfect and ruinous condition, even below Forsyth, entered into a contract with Robert Collins, Elam Alexander, John D. Gray & Co. Daniel McDougald and Arthur B. Davis, to build and equip the said road from and between Griffin and Atlanta; and, among other things, it was stipulated, that the entire railroad with all its appurtenances, should be vested in the said contractors, until all the dues and payments to which they should be entitled under said contract should be fully met and satisfied.

In 1844, the Roswell Manufacturing Company and other creditors, having obtained judgments against the Monroe Railroad and Banking Company, sought to subject said road to levy and sale, at law, by virtue of their executions.

[1.] Whether a railroad is subject to levy and sale at law, is seriously doubted. In Pennsylvania it has been decided, that a *turnpike* was not the subject of sale. *Henmout vs. The Pittsburg Turnpike Company*, 13 *Serg. & Rawle*, 210. In North Carolina, on the contrary, it has been held that a railroad company has an estate in the land, and not a mere easement, and that the estate is subject to sale under execution. *State vs. Rives*, 5 *Ired. Law Rep.* 307. We do not decide this question.

To resume the narrative: the company obtained an injunction and arrested the Common Law *fi. fas.* and at May Term, 1845, of the Superior Court of Bibb County, obtained a decree for the sale of the road and equipments, together with all the rights, franchises and property therewith connected, and for a distribution of the proceeds among all the creditors, according to the priority of their claims—the said company having become entirely insolvent and unable to complete the road, or keep the same in operation, or to pay their debts.

The decree further found, that there were various descriptions of creditors; viz: holders of the bank-notes issued by the company; holders of bonds issued for work and materials for said road; judgment creditors; creditors holding certificates of de-

posit ; demands for work, labor and materials for said railroad, and creditors claiming to be mortgage creditors of said company, and others not specifically enumerated ; and that among them were creditors who claimed a priority of right in respect to their claims.

David C. Campbell, Abner P. Powers, James A. Nisbet, Samuel B. Hunter and Thomas Hardeman, were appointed commissioners to sell the road, on the first Tuesday in August, 1845, after giving two months' notice in the public gazettes of Macon, Griffin and Savannah, and the proceeds were directed to be paid into Court—public notice was to be given to the creditors of the company to file their claims or a schedule of them with the Clerk, by the first Monday in October next ensuing the sale ; and in the event of any controversy, the creditors were authorized and directed to litigate among themselves, and their several and respective liens were to be investigated and adjudicated.

It was further decreed, that the purchasers of the road should succeed to all the obligations of the company in regard to the completing, equipping and keeping the road in operation, as intended and designed by the Act of incorporation, but not to extend to any liability for debts contracted prior to the sale ; and, *finally*, William B. Parker, the complainant in the bill, was appointed *trustee* in charge of the road, with its appurtenances, until the sale should be consummated ; and it was made his duty to make monthly returns of the receipts and expenditures, and file the same with the Clerk of the Court, subject to the examination and approval of the Court.

In pursuance of this decree, the road was sold at the time and place designated, and bid off by Jerry Cowles, acting as the agent of Daniel Tyler, at and for the sum of \$155,000, and a deed was executed by the commissioners. The whole amount brought into Court for distribution, including the price of some disconnected property, was \$160,525 33.

To settle the difficulty as to the sale of a franchise, without the consent of the power which granted it, upon application to the Legislature, an Act was passed in 1847, creating Daniel Tyler, the purchaser, and his associates, a body politic and corpo-

rate, by the name and style of the Macon & Western Railroad Company, and conferring on them all the powers, privileges and immunities of the old company, with the exception of banking. *Pamphlet Laws of 1847, p. 181.*

At the May Term, 1846, of the Superior Court of Bibb County, the question of the distribution of the fund arising from the sale of the road with its appendages, among the creditors, came up, when it was insisted, on the part of the Central Bank and others, *bill-holders* of the company, that the money in hand should be first applied in satisfaction of the *bills*, by virtue of the statutory lien, created by the 11th section of the charter. On the other hand, counsel for Robert Collins, one of the joint contractors under the agreement of 2d August, 1842, contended that he, as the holder of bonds and certificates, secured by mortgage on said road for work, labor and materials done and furnished subsequent to the execution of said mortgage, and on the faith thereof, was entitled to priority of payment out of said fund.

The presiding Judge ruled, that the lien of the *bills* of the company, under the 11th section of their charter, was paramount to and over-rode all others, and directed the money to be paid out accordingly. To this decision counsel for Collins excepted.

At August Term, 1846, at Decatur, this cause came up, on writ of error, to be heard before this Court, when it was adjudged, that the *bill-holders* had a paramount lien *only* on the fund raised from the sale of the railroad from Macon to Griffin, and so much of the road from Griffin to Atlanta as was built by the company prior to the contract of August, 1842, and that the contractors under the agreement of that date, had a prior and superior equity, to be paid out of said fund, in proportion to the relative value of the work done by them on said road, and materials and equipments furnished between Griffin and the upper terminus in DeKalb, and the Court below was instructed to appoint three commissioners to apportion the proceeds of the sale accordingly. So much for the previous history of this case.

William B. Parker, the individual designated as *trustee* under the decree for the purposes therein stated, now files his bill in

Bibb Superior Court, alleging that he is the holder, by transfer from John D. Gray, one of the original joint contractors, of bonds and certificates of indebtedness, arising under the agreement of 2d August, 1842, to the amount of \$47,500, principal. The bill charges fraud, irregularity, and want and excess of jurisdiction, in procuring the decree of May, 1845, and notice of the whole by Tyler, through his agent, Jerry Cowles. It also charges that Tyler, before he paid the purchase money, had notice of said irregularities, and of complainant's lien; and that the present company, by Tyler, its first president, also before it paid its money, had notice of the aforesaid irregularities, and of Parker's claims, and of their character, and that Parker was not a party to the first bill, *though he went before the Court and protested against it, when a motion was made to confirm and ratify the commissioners' report, and objected to the entire proceeding so far as it might prejudice his mortgage rights*; that after the money was paid by Tyler, and under the advertisement for all creditors to come in and prove their debts, various creditors did so, *but that he declined to participate*; that on the day of sale he was present, and proclaimed aloud, so that Jerry Cowles and all present heard him, that he held these liens, which he is now seeking to enforce, *and that on this account the road sold for much less than it otherwise would have brought.*

The specification of fraud and irregularity charged in the bill is this: That after the Jury had retired, the solicitor of the company went into their room, and counseled with the Jury concerning their finding; that Tyler was really agent for persons at the north—residing in New York and Massachusetts—who afterwards came forward as stockholders, and ~~that~~ it was their money, and not his, that paid ~~for~~ the road; ~~and~~ that he took the deed in his name in fraud, to have the apparent shield of the company of being *bona fide* purchasers.

The bill admits, that the contractors did not finish and furnish the road, nor does it aver any offer, on their part, to do so in terms of their agreement, before or since the public sale, but urges the failure of the old company as an excuse for this precedent duty, to foreclosing on the road, and sets up their practical

waiver, namely: the issuing of these certificates for the work actually done, and prays to foreclose complainant's debt, either—

1st. On the entire road and its receipts; or,

2d. On that part which was built by Gray and others, under the mortgage of 2d August, 1842, and its net receipts; or,

3d. Upon the net receipts alone of the part so built by the contractors between Griffin and Atlanta.

So much for the case, as made by the bill. Has the complainant any equity which entitles him to the relief which he seeks?

[2.] It is admitted to be now an established rule of Chancery practice, that for the purpose of marshaling the assets of an insolvent debtor's estate, that the executor or administrator may file his bill and obtain a decree not only for the purpose of reducing the property to money, but also of ascertaining the order in which the debts are to be paid; and, that this done, all the creditors will be restrained from prosecuting their respective claims at Law; and that not only as to creditors who were *eo nomine* parties to the proceeding, but to all others. *Toller*, 455. *Brown and others vs. McDonald*. *Matter of the Bank of Buffalo*, 10 *Paige*, 378.

One of the grounds upon which this doctrine is based is, that the executor or administrator may not be harrassed by a multiplicity of suits, or a race of diligence be encouraged between different creditors, each striving for an undue mastery and preference. *Jeremy on Eq. Jur. b. 3, pt. 2, ch. 5, p. 538 to 543*.

Again: no other Court but that of Chancery possesses any adequate jurisdiction to reach or dispose of the entire merits. 1 *Story Eq. Jur.* §550.

[3.] As a general rule, Chancery ~~does~~ not assume jurisdiction in taking into its own hands ~~executions~~ upon judgments at Law. Such power would be oppressive both to the debtor and the Court.

[4.] For the presumption is, that the Court which renders the judgment is competent to enforce it; and therefore it is only in special cases that a Court of Equity interferes. *Brinkerhoff and others vs. Brown and others*, 4 *Johns. Ch. Rep.* 671. Whenever, however, the property of a judgment debtor is incumbered

equities or trusts, or involves a variety of interests upon general principles of justice, a Court of Chancery will interpose and administer the assets. *Piatt vs. St. Clair*, 6 *Hammond*, 233.

[5.] The facts of the case under consideration were novel and peculiar. Here was a road extending through six Counties, and one hundred miles in length.

[6.] What disastrous consequences would have resulted, if each judgment creditor had been allowed to seize and sell separate portions of the road, at different sales, in the six different Counties through which it passed, and to different purchasers! Would not this valuable property have been utterly sacrificed—the rights and interests of the creditors, as well as the objects and intentions of the Legislature in granting this charter, entirely defeated?

[7.] I feel warranted in saying, that the whole history of Equity Jurisprudence does not present a case which made the interposition of its powers not only highly expedient, but so indispensably necessary in adjusting the rights of *creditors* to an *insolvent's estate*, as this did.

The Chancellor, then, in taking this matter in hand and directing a sale of the entire interest for the benefit of all concerned, was but invoking the powers of Equity to aid the defects of the Law, and applying analogous principles to the existing emergency; and so far from transcending his authority, he is entitled to the thanks of the parties and the country, for the correct and enlightened policy which he adopted. Had he faltered or shunned the responsibility thus cast upon him, he would have shown himself unworthy of the high office which he filled. As it is, this precedent will stand out in bold relief, as a landmark for future adjudications.

[8.] And what, I ask, is the ground of the present complaint? It is not an attempt to restrain a creditor from proceeding *at Law*, who, without fault on his part, has been excluded from participating in the common fund; but one claiming to be a creditor, but refusing to present his demand under the decree, and submit himself to the jurisdiction of the Court, for the settlement ~~and~~ adjustment of his debt upon the fund to be distributed,

comes forward and asks the assistance of Chancery to set aside its own decree, and annul the title to the property sold under it, in order that he may be paid.

[9.] It is true that the complainant alleges, in his bill, that he was not a party to the suit, and that he protested against it; but if justice has been done, is this any reason why he, on this account, should be treated with extraordinary favor and indulgence?

The bill admits, that "The officers of the Monroe Railroad and Banking Company believed that the contractors would not be materially injured by their proceeding, and that they were acting toward them in good faith; that the mortgage contract was a lien better and higher than all others, and that out of the proceeds of the sale, their lien would be first satisfied, for all labor bestowed and materials furnished under the contract of August, 1842; but that it had been decided by the Supreme Court, that the lien of the bill-holders over-rode said mortgage lien, as to all the road except that part above Griffin, which was not sufficient to satisfy all the mortgage contracts, or even those held by complainant."

Or, to use the more forcible language of counsel for the contractors, when this case was first before this Court, "It is obvious that the complainants in the original bill acted as far as they were able, and as far as they knew how, in good faith toward the contractors. Their object was to give the laborer his hire. Will any one do them the injustice—will any one so pervert the reading of the record—as to say that the object of the complainants in that bill was to sell the road and give the money to the bill-holders, and exclude the contractors from even a participation in the fund? Although, by so doing, they would relieve the stockholders of a heavy liability, we believe they acted in good faith, and that it does them gross injustice to suppose that they were using the Judiciary as an instrument to perpetrate a most iniquitous fraud. *Indeed, the decree speaks for itself.*" *Col. Bailey's Argument*, 1 Kelly, 446, 447.

If, then, as the bill admits, the proceeding under which this road was sold, not only originated in, but was conducted to its

conclusion in good faith to the contractors, and the decree was in conformity with the practice and usage in Equity, not pretending to fix or establish the payment or priority of any particular debt, but leaving this matter to be settled among and between the creditors themselves, upon coming in upon the fund under the decree, (*Id.*) I am at a loss to perceive upon what principle this transaction, so just to Parker and beneficial to all concerned, is to be impugned, and the title to the property, acquired under it, vacated—none that will bear the test of legal investigation.

The bill charges, that it was supposed, that out of the proceeds of the sale, the contractors' lien would be first satisfied, but that the lien of the bill-holders was decided, by this Court, to over-ride the mortgage lien, except to that part of the road above Griffin, which was built by the contractors; and that this portion of the fund was not sufficient to discharge all the mortgage contracts, or even the \$47,500, held by the complainant.

Surely, this assignee does not come into *Equity* to get more than the laws of the land will award to him? Under this judicial sale, every dollar which that portion of the road brought, built by the contractors, to the extent of the work they performed and the materials they furnished, has gone into their pockets; and because it fell short of extinguishing their demand, and the balance of the money arising from the sale of that part of the road constructed by the company previous to its insolvency, and to the contract of 1842, has been distributed to the bill-holders, by virtue of their statutory lien—is this a ground for cancelling Tyler's title?

Mr. Parker complains that the property did not sell for its full value, but for much less, owing to the public notice that was given of these liens. If this vast interest, costing as it is charged, nearly \$2,000,000, was thus sacrificed, who is to blame? It was not only the most advantageous, but the only possible mode of bringing it into market, to make it command a fair price. Cut up into an indefinite number of small parts, it would have brought nothing, besides thwarting the whole design of the charter, by these fragments being bought by individuals or sepa-

rate companies. Instead of interfering, then, to counteract the praiseworthy object of the decree, why did he not aid in promoting it, and thus subserve, not only his own interest, but that of all the other creditors?

The bill admits, that the *whole* amount divided among *all* the contractors, was not enough to satisfy the complainant's debt. What a singular proposition then to maintain, that although the whole were only entitled, in Law, to a less sum than this individual claims, out of the entire proceeds, yet that this and every other creditor of the same grade, by standing out and standing off, and pursuing his remedy separately, would realize the sum total of his claim! And if such a procedure were permitted, when and where would these successive foreclosures and sales or *sequestrations* terminate?

There are other interesting aspects in which this question might be presented, but for our dread of being tedious. One view and a controlling one with the Court was this: it is conceded that if the sale had been made under the highest lien, that the title of the company would have been divested, and that the purchaser would have taken the property, discharged of all incumbrances. The record shows that such was the fact. The Central Bank and other bill-holders, and Robert Collins, one of the joint contractors, came in under the decree, and made their claim to the fund. If not parties to the suit before, they became so in fact by thus presenting their demands and submitting themselves to the jurisdiction of the Court. Here, then, were the two highest liens known to the law, upon the entire property—that of the bill-holders, created by the Statute, on that part of the road built by the company, and that of the contractors, secured by the agreement of August, 1842, on that part of the road they built, and the materials they furnished. How, then, can creditors of equal or inferior grade disturb this transaction? If they have failed to participate in the fund thus raised, it is their own fault. Equity would ~~restrain~~ them from proceeding *at Law* to enforce their ~~claims—such more will~~ it refuse to sanction the effort now making.

Again: the bill admits that the agreement was not performed

on the part of the contractors, nor does it aver an offer to complete the contract, either before or after the sale. If, under these circumstances, the contractors have received compensation as far as the fund would allow, for the work, labor, money and materials, done and expended by them in the construction of the road, can they, in conscience, seek to make the *road itself* liable for any thing more? We think not; but we prefer to rest this decision upon the broad ground of a more comprehensive equity, and accordingly we hold that the judgment below be reversed, and the demurrer to the bill sustained, upon the ground that the complainant is not entitled to the relief which he seeks.

No. 71.—RADFORD E. MORROW *et al.* plaintiffs in error, vs. SAMUEL HANSON, defendant in error.

[1.] Where suit was instituted on a promissory note, and the defendant pleaded a *total* failure of consideration, and alleged a *parol* warranty of the property for which the note was given, as a part of his defence: *Held*, that the plaintiff could not avoid this defence by insisting on the Statute of Limitations, although more than four years had elapsed from the time of such parol warranty.

Assumpsit and motion for a new trial, in Henry Superior Court. Heard and decided by Judge STARK, October Term, 1850.

An action of assumpsit was instituted by Samuel Hanson against Radford E. Morrow and Vincent P. Morrow, on ——— promissory notes, the balance of the purchase money for a jackass, purchased by Morrow from Hanson, returnable to October Term, 1846, of Henry Superior Court. The notes were dated the ———, 1840, and fell due on the 25th day of December of the

same year, and were for thirty dollars each. The defendants pleaded failure of consideration.

On the trial the plaintiff demurred to the plea, on the ground that as the warranty of the jack was by parol, and more than four years had elapsed from the time of the making and failure of the warranty, the Statute of Limitations barred the defence. The Court overruled the demurrer. The Jury found a verdict for the defendants; whereupon, counsel for plaintiff moved for a new trial, on the ground that the Court erred in deciding and ruling that the defendants were not barred from pleading failure of consideration to the notes, more than four years having elapsed since the notes became due, and the failure of the warranty of the jack.

At October Term, 1850, the Court granted a rule absolute for a new trial, on the ground taken in the rule *nisi*, and reinstated the case.

Whereupon counsel for the defendants excepted and assigned error.

W. W. CLARK, for plaintiffs in error.

J. FLOYD, for defendant in error.

By the Court.—WARNER J. delivering the opinion.

The only point in this case is, whether in a suit upon a promissory note by the plaintiff, the defendant may show, by way of defence, a warranty of the property for which the note was given, and that the consideration had *totally failed*, the warranty being by *parol*, and more than four years having elapsed from the time of making such parol warranty. The general rule of law is, that where there is a *total failure* of the consideration, and the defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such total failure of consideration may be shown in bar of the action. 2 *Greenleaf's Ev.* §113, 136. So long as the plaintiff has the legal right to sue the defendant, he may defend himself by show-

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ing he has *no cause of action against him*. The note of the plaintiff imports a consideration on its face, but it is competent for the defendant to show, either that there was no consideration, or that ~~the~~ consideration for which it was given has *totally failed*; in other words, that the plaintiff has *no cause of action against him*; and it is not competent for the plaintiff to insist upon the Statute of Limitations, in order to avoid the defendant's defence, when he is seeking to enforce the contract against him. So long as the plaintiff has the legal right to *sue on the contract*, the defendant has the co-relative right *to defend it*.

Let the judgment of the Court below be reversed.

No. 72.—SMITH & MERRITT, plaintiffs in error, *vs.* DAVID DICKSON and JOHN HARRIS, defendants in error.

[1.] An execution which has been levied, and upon which is an entry by the Sheriff of, *levy indefinitely postponed by the plaintiff's attorney*, is sought to be enforced by a sale of the property levied on, more than seven years after the date of the entry: *Held* to be void, upon illegality put in by the defendant in execution, under the Act of 1823.

Affidavit of illegality, in Newton Superior Court. Heard and decided by Judge STARK, September Term, 1850.

An execution in favor of the plaintiffs in error against the defendants in error, was issued the 13th day of October, 1840, on a judgment rendered on the 1st day of October, 1840.

On the *fi. fa.* ~~there was a levy on~~ real and personal property, bearing date ~~25th day of December,~~ 1840, and an entry, as follows: "The above levy, advertised for sale the first Tuesday in February, 1841, and postponed by plaintiff's attorney to the first Tuesday in March, 1841, and then postponed indefinitely by *said plaintiffs' attorney*." The bond given for the delivery of

the property levied on had been, by order of Court, turned over to the present Sheriff of Newton County, whose proceeding was estopped by the interposition of an affidavit of illegality by the defendants, on the ground, "That from and after the 1st Tuesday in March, 1841, until the present time, viz: 24th October, 1849, no return hath been made on said *fi. fa.* by the proper officer for executing and returning the same, and that consequently the judgment on which said *fi. fa.* is founded is void and of no effect."

On the hearing of the affidavit of illegality, plaintiffs introduced Jno. N. Williamson, the attorney of record, in obtaining the judgment, who testified, that after the levy had been made, the defendant (Harris) applied to him to have the sale postponed, which was done for one month. At the next sale day, Harris again made application to have the sale postponed indefinitely, and requested the witness to write to all plaintiffs in execution, and ascertain if a compromise could not be effected. The proposition was agreed to by the witness, as there was a mortgage on all or a greater part of the property levied on. Under this arrangement, (a bond being given for the delivery of the property,) witness ordered the sale to be indefinitely postponed.

The Court sustained the affidavit of illegality, on the ground that the *fi. fa.* had become dormant under the operation of the Statute of 1823.

W. W. CLARK, for plaintiffs in error.

REESE, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] There was a levy of ~~the~~ execution, and the property was advertised for sale on ~~the first Tuesday in February, 1841.~~ By the entry of the Sheriff on the execution, it appears that ~~the~~ sale was postponed by order of the plaintiffs, to the first Tuesday in March following, and then postponed indefinitely by the plaintiffs' attorney. The last entry, then, on the *fi. fa.* is in

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March, 1841, more than seven years anterior to the present attempt to enforce the execution by a sale under this indefinitely postponed levy. The **illegality** claims, that the execution is barred by lapse of time, and so the **Court held**, and this decision is assigned for error. There is no entry or return of any kind on the *fi. fa.* within seven years, as required by the Statute. It is argued, however, for the plaintiffs in error, that the levy being postponed by the plaintiff, and that being entered, there is a continuous action on the execution—the levy subsisting until it is disposed of; and farther, that the entry of *indefinite postponement*, is an entry, as it were, with a *continuando*. If the argument was not presented in just this form, yet such must be its structure, to possess even the shadow of plausibility; because the Statute does positively declare all judgments void after seven years, unless there is an entry or return upon it within seven years. The seven years having elapsed in this case, it became indispensable for the plaintiff in error, upon some hypothesis, to make **but an entry**. Now, it strikes me that an *indefinite* postponement of a levy is a dismissal. To what time is the sale postponed? To no time. If the levy thus postponed be a valid, subsisting levy for one year, why not for seven? and if for seven, why not for seventy? It may be questionable whether a levy can be good after a specific postponement of the sale beyond the next sale day. To be good, the postponement must be to a time certain. Certainly an indefinite postponement does not retain the levy. To my mind it is palpably an abandonment of the levy by the plaintiff. But admit, for the sake of the argument, that such an entry retains the levy and keeps the execution alive, how long does it keep it alive? Is it to be presumed that it over-rides a Statute and keeps it alive in the teeth of the law? If it can—if such an entry prevents the dormancy of the judgment—then it is competent for a plaintiff to sit down and, by an entry on his *fi. fa.* defeat, over-ride, nullify an Act of the Legislature. The law declares that there must be an entry within seven years, and the plaintiff says, “True, but I postpone to-day my levy indefinitely, which prevents the operation of the law—which preserves the vitality of my *fi. fa.* not only for seven

years, but for any number of years." If an execution is **not** barred in seven years after such an entry, when is it barred? The answer is, never; and if **that** is so, has not the entry abrogated the law? If it **is** a valid entry at all, it is good only as any other entry would be that is to prevent the execution from becoming dormant within seven years from its date. This Court has held, and we still hold, that the Statute requires an entry every seven years. The Act of 1823, is intended for the benefit of *bona fide* purchasers and junior judgment creditors. The object is to prevent injury to them by fraudulently keeping open judgments which are paid. It, to effect this object, prescribes a term of limitation; but this term does not bar if, within it, entries are made on the execution, which show it to be *prima facie*, subsisting and unpaid—entries which exhibit diligence on the part of the plaintiff to prevent a bar. Purchasers and junior creditors are not benefited by the lapse of time, if there be such entries, and upon what principle? Why, the entries are **notice** to them, the *fi. fa.* being open to the inspection of the **world**, that it is still a subsisting, unpaid judgment. But is such an entry as this notice? What are people to infer when they find on an execution an order of the plaintiff indefinitely postponing a levy—indefinitely postponing *the means of realizing his money*? They must infer that the plaintiff has got his money, and, therefore, he has forever postponed his levy.

The plaintiff in error takes another position equally indefensible. It appears, by the evidence, that the indefinite postponement of this levy was at the instance of the defendant, and by an arrangement with him. Now, it is said, first, that this evidence rebuts the presumption of any fraudulent intent on the part of the plaintiff to keep the execution alive and open. Let that be so. Yet this part of the transaction does not appear on the execution; it exists in parol. Nobody is notified by it. Purchasers and other creditors know nothing about it. Besides, the Statute says not one word about arrangements and agreements between plaintiff and defendant, but it does say, that there must be an entry on the *fi. fa.* to prevent the bar. Arrangements and fraudulent collusion between plaintiff and defendant are the

very things which the Act intends to prevent. It will not do to prove an arrangement between them and then assume it to be honest. It is *the arrangement* which it intends to prevent. We cannot recognise any arrangement, not appearing on the execution, as arresting the limitation. Secondly, it is said, there are no creditors or purchasers here contesting this judgment, but the defendant alone, and that he is not to be heard when he comes into Court to take the benefit of a bar, which has grown up under an arrangement to which he was a party, and which was in fact proposed by him. True, there are no creditors or purchasers before the Court, but it does not follow that there are none. But if there were none, what then? Why, it is the duty of the Court to sustain the Statute, for the sake of creditors and purchasers in all similar cases. The construction of the Statute is before us, and from that we cannot shrink. If, however, by this record the question were made, (which is not,) whether the defendant could make the question of the validity of this judgment, we should still have no difficulty about it. The Statute, as before stated, requires entries to be made to prevent the judgment becoming dormant. To defeat the Statute an agreement is made between plaintiff and defendant, or if not to *defeat it*, yet which is clearly against the policy of the Statute. The defendant is seeking to avail himself of it, by setting up the bar of the Statute, which has been perfected in consequence of it. In such a case what is the rule? "*In pari delicto portior est conditio defendentis.*" The plaintiff attempting to enforce the judgment under an agreement in violation of law, the defendant, though equally guilty with him, may be heard in defence, not because the law regards his rights, but for the sake of the public policy. *Adams vs. Barrett*, 5 Ga. R. 415, 416.

Let the judgment be affirmed.

No. 73.—THE STATE OF GEORGIA, plaintiff in error, vs. HENRY G. DEAN, defendant.

[1.] Where the law guarantees to parties the right of appeal, and no time is prescribed within which the appeal shall be entered, it must be done within four days from the date of the decision complained of, that being fixed as a reasonable time, according to the general law regulating appeals in ordinary cases.

Award and motion to dismiss appeal, in DeKalb Superior Court. Heard and decided by Judge HILL, September Term, 1850.

The Governor and Chief Engineer of the Western & Atlantic Railroad and Henry G. Dean, being unable to agree as to the amount of damages the defendant should receive for the construction of the said road through his land, referred the matter to arbitrators, as provided by the Statute authorizing the construction of the Western & Atlantic Railroad.

An award was rendered on the 4th day of April, 1850, in favor of the defendant, for \$1500. The Chief Engineer notified the arbitrators of his dissatisfaction with the award, on the 4th day of September following, and desired to appeal therefrom. The papers were sent up by the arbitrators, and filed in the office of the Clerk of the Superior Court of DeKalb County, on the 5th day of September.

The cause came on to be tried before Judge *Hill*, at September Term, 1850, when counsel for the defendant moved to dismiss the appeal, on the ground—

1st. That the Chief Engineer, as the agent for the State, did not give notice to the arbitrators of his dissatisfaction with the award, and his desire to appeal therefrom, within the time prescribed by law.

2d. Because the appeal was not entered in the time prescribed by law.

Which motion the Court sustained and dismissed the appeal; whereupon counsel for plaintiff excepted.

EZZARD & MURPHY, for plaintiff in error.

IRWIN & RICE, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

In the 6th section of the Act passed 21st December, 1836, for the construction of the State Railroad, it is *provided*, that “The engineer and superintendent shall have full power and authority to treat with any owner of land through which the said road may be cut, or from which any timber or other material may be taken, and to fix and agree upon a compensation for the same; and that in the event of disagreement, the injury or damages shall be, in writing, submitted to and adjudged and determined by three arbitrators, sworn to do justice between the State and the party aggrieved; one of whom is to be chosen by the engineer and superintendent, one by the other party, and the third by the two so chosen; or if they cannot select, by any three or more of the Justices of the Inferior Court of the County in which such land may lie, either in term time or vacation. All of which submission, choice, appointment and award, shall be reduced to writing. And it is made lawful for the engineer or superintendent, for and on behalf of the State, or for the other party to the award of the said arbitrators, to present to them a written declaration of dissatisfaction therewith, and desire to appeal therefrom, who shall thereupon transmit, forthwith, to the Clerk of the Superior Court of the County wherein said land may lie, all previous proceedings in the case, together with such appeal, to be tried by a Special Jury, as in other cases of appeal, without formal pleadings or issue; which said appeal shall be presented on the part of the State, by the Attorney or Solicitor General officiating in such Court.” *Prince*, 356.

J. F. Payne, Hiram Hooper and Thomas Hooper, having been selected, under this Act, as arbitrators to ascertain the injury done to the land of Henry G. Dean, *Junior*, by reason of the cutting of the State Railroad through his premises, met on the

4th day of April, 1850, and awarded to the owner the sum of fifteen hundred dollars as his damages.

On the 4th of September thereafter, William L. Mitchell, Esq. the Chief Engineer, for and on behalf of the State, presented to the arbitrators, his written dissatisfaction with the award, and gave notice of his desire to appeal therefrom, in terms of the Act. The papers were forthwith transmitted to the Clerk of the Superior Court of DeKalb County, and by him filed in his office on the 5th of September.

At the ensuing term of the Court, which met on the third Monday of the month, the presiding Judge, upon motion of counsel for Dean, the respondent, dismissed the appeal; whereupon the counsel for the State excepted.

[1.] The only question to be determined, therefore, is, whether the appeal by the State from the award of the arbitrators was entered in time?

The Act of 1836 specifies no time within which appeals shall be entered. It does not provide even, that appeals shall be tried at the *next* term of the Superior Court of the County where the land lies.

When a Statute guarantees to parties the right of appeal, and no time is designated within which it shall be entered, the rule is, that it must be done within a reasonable time; and the Legislature of Georgia have determined, that a reasonable time for appealing is *four days*—that being the period fixed by law within which appeals, in ordinary suits, shall be entered.

Knowing, however, as we do, that a contrary practice has prevailed throughout the State, under the various charters containing similar provisions to those in the Act of 1836, and that it has been usual, in all the Circuits, to allow appeals to be entered at any time before the next term of the Court after the award was made by the appraisers, we are unwilling to prescribe a definite rule and apply it to existing cases; and one which, being made to operate retroactively, would deprive parties of the privilege of having their rights passed upon by a Special Jury.

In the exercise, then, of the plenary powers conferred upon this Court, of giving such direction to cases as shall be in ac-

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cordance with justice and equity, we shall reverse the judgment, dismissing the appeal, and order it to be re-instated, without any disparagement, as it will be perceived, to the legal acumen of our learned brother, who held that it had not been entered within a reasonable time.

No. 74.—DANIEL TYLER, plaintiff in error, vs. JOHN D. GRAY, defendant in error.

[1.] When the Jury find a verdict contrary to the charge of the Court, and manifestly contrary to law, a new trial will be granted.

Assumpsit in Bibb Superior Court, and motion for a new trial. Heard and decided by Judge STARK, July Term, 1850.

This was an action instituted by John D. Gray against Daniel Tyler, for the recovery of \$450 14, as compensation for the services of the plaintiff, and the hire of his negroes, upon the Monroe Railroad, for the months of November and December, 1845.

The defendant pleaded a set-off of \$4953 73, as money raised for freight and passengers on the road during the same time, and received by the plaintiff.

On the trial, *Midas L. Graybill* testified, that Daniel Tyler was the owner of the Monroe Railroad in November and December, 1845; that Gray run the road during these months; that the items in plaintiff's account for services of plaintiff and negro hire, were correct—the services of Gray were worth from \$125 to \$150 per month, &c. Witness was employed by Gray, and knows that he (witness) paid out all the money that was received during the months of November and December, and that the said items in the account were not paid. In paying out

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money, he was governed by Gray's orders. The road, prior to the month of November, was in the hands of the commissioners, who sold the road, and Mr. Whittle was their agent. The whole receipts of the road during the months of November and December, amounted to.....\$4,356 79

Mr. Whittle turned over, to pay debts which were incurred during his service, the sum of..... 596 94

4,953 73

Disbursed during three months for wages, materials, &c. and running the road...2,771 20

Paid R. Collins for the hire of his negroes for the same months..... 662 00

J. D. Gray's negroes for same time..... 431 12

S. H. Martin's negroes for same time..... 201 53 4,165 85

787 88

In the item of \$2771 20 of disbursements, are included items of expenses incurred during the time of Mr. Whittle, equal to the amount paid over by him, and a part of the receipts of November and December were applied, by Mr. Gray's order, to the payment of debts contracted prior to the month of November, 1845; that the hire of Gray's negroes from the 1st September to January, amounted to eleven hundred and odd dollars, and from the 1st of November to 1st January, the hire amounted to \$431 12; that all sums received during the months of November and December, were paid out to debts legitimately due by the said road. A part was paid to debts contracted before Tyler got possession of the road—none of the money passed through Gray's hands. Witness paid it out as the agent for Gray, and by his orders, to the road. When Gray went out there was no money in hand.

L. N. Whittle testified, that he paid over a sum of money to be applied to the payment of debts, contracted while he had the superintendence of the road under the commissioners, which he required to be paid to the expenses that he (Whittle) left unpaid; that by order of Tyler, he placed Gray in possession of the

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road, &c. with orders to employ all necessary agents, labor, &c. to carry on the said road. The money left (by Whittle) was about enough to pay all the expenses he left unpaid—probably a little more.

The Court charged the Jury as follows: “In this case a set-off is pleaded. The Jury must look into the evidence, and see if the accounts have been proved, and if the account proven by one of the parties is larger than that proven by the other, the smaller must be deducted from the larger, and a verdict be given accordingly. The defendant is not liable for the debts contracted for the use of the road prior to his getting possession of it. The plaintiff is liable for all moneys which came to the hands of himself or his agents, for the months of November and December, subject to all payments made for expenses of these months. The money Graybill received from Whittle, being received as Tyler’s agent, was of right paid by Gray towards the expenses Whittle left unpaid.”

The Jury found a verdict for the plaintiff; whereupon counsel for the defendant moved the Court for a new trial, on the grounds—

1st. Because the verdict of the Jury is contrary to evidence.

2d. Because the verdict of the Jury is contrary to the charge of the Court.

The Court refused to grant the motion for a new trial; whereupon counsel for the defendant excepted.

McDONALD, for plaintiff in error.

POWERS and WHITTLE, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The motion for a new trial in this case ought to have been granted, upon the ground that the Jury found contrary to the charge of the Court, which charge, in our judgment, was in accordance with the law governing the rights of the parties—consequently the verdict is contrary to law.

Tyler vs. Gray.

Gray sued Tyler on an open account for \$450 14. On the trial, the plaintiff proved, by one witness (Graybill) two items in the account only, amounting to the sum of \$424 14. The defendant pleaded, as a set-off, an account against the plaintiff for money received by him for freight and passengers on Monroe Railroad, in the months of November and December, 1845, \$4356 79; also, \$596 94 for cash received—making the total amount of the defendant's account, \$4953 73.

Tyler became the owner of the road in November, and was entitled to the receipts thereof for the months of November and December, 1845. The receipts of those two months amounted, according to the testimony of Graybill, to the sum of \$4356 79. Whittle turned over cash to pay debts which had been incurred by the road before Tyler became the owner, \$596 94—thus making the total amount received \$4953 73. The disbursements made during the months of November and December, including the \$596 94, turned over by Whittle to pay debts which had been contracted prior to that time, amounted to the sum of \$4065 85. Now, if we deduct the total expenses of the road for the months of November and December from the amount received during the same time, there will be found a balance due Tyler, the defendant, of \$887 88, *exclusive* of the plaintiff's account now sued on. Deduct the plaintiff's account as proved, there still remains \$463 74 due the defendant. Graybill, the witness, appears to have been the plaintiff's cashier to receive and disburse the money made by the road, and acted under Gray's orders. The money paid over to him by Whittle was applied, by Gray's order, to the payment of debts contracted *prior* to November and December, and that all sums received during these months were paid out to debts legitimately due by the said road; but it will be remarked, that the plaintiff had no authority to order the money of Tyler to be applied to any debts due by the road before he became the owner of it in November, although the same might have been *legitimately due* by those who, in law, were bound for the payment thereof. The witness further states, *that a part of the money was paid to debts contracted before Capt. Tyler got possession of the road.* For these debts

Tyler vs. Gray.

Capt. Tyler was not liable, and if the plaintiff ordered *his* money to be appropriated to the payment of such debts, then he is liable to account to Tyler therefor. Whittle does not testify that the money turned over by him was sufficient to pay *all* the debts due by the road—that it was about enough to pay all the debts *he contracted for the road*. Graybill was the witness for the plaintiff, and being his cashier, it is a little remarkable ~~that~~ he cannot speak as *definitely* in regard to the amount of money paid to debts *contracted before Tyler got possession of the road*, as he does in regard to the other items of disbursement.

The Court charged the Jury, that the defendant (Tyler) was not liable for the debts contracted for the use of the road *prior* to his getting possession of it. The testimony shows, that a portion of the money which belonged to the defendant has been so appropriated, and it is to be regretted the witness does not state how much; but the inference is very strong, that the balance of the money received, not particularly accounted for in the items of disbursement, was so appropriated. The money being so appropriated by the *orders* of the plaintiff, he is as liable to account for it as if it had actually passed through his hands. The Jury having rejected the whole of the defendant's set-off, and found a verdict for the plaintiff for four hundred and twenty-four dollars and fourteen cents, their finding is contrary to the charge of the Court, and contrary to law.

Let the judgment of the Court below be reversed.

No. 75.—SEABORN J. THOMPSON, plaintiff in error, vs. THE CENTRAL BANK OF GEORGIA, defendant.

- [1.] When a Sheriff has received money on a *fi. fa.* the Statute of Limitations begins to run in his favor from the time it was received.
- [2.] Exceptions to the sufficiency of a rule against the Sheriff, taken upon the trial eighteen months after the filing of the rule, come too late.
- [3.] A new trial granted upon the ground of newly discovered evidence.

Rule against Sheriff, in Troup Superior Court. Tried before Judge HILL, November Term, 1850.

An execution in favor of the Central Bank of Georgia against Benjamin P. Robertson, returnable to October Term of Troup Superior Court, 1843, was placed in the hands of Seaborn J. Thompson, the plaintiff in error, then Sheriff of Troup County. The money was raised partly by levy and sale, and partly by payment by defendant in the execution, by the 5th day of September thereafter, and was duly credited by the Sheriff on the execution. At the May Term of Troup Superior Court, 1849, a rule *nisi* was taken, calling on the said Thompson to show cause why he should not be required to pay over the money to plaintiff or his attorney. The Sheriff answered and showed for cause, that he paid the money to plaintiff's attorney a short time after it was raised, and also answered, that more than four years had elapsed after the term of the Court to which the execution was returnable, and that, therefore, the remedy of plaintiff was barred by the Statute of Limitations. The plaintiff traversed this answer, and issue was joined.

The trial upon this issue came on at the November Term, 1850, of the Court, when counsel for the Sheriff moved the Court to discharge the rule—

1st. Because it did not sufficiently set forth the *fi. fa.* on which it was taken; not setting forth the amount of the *fi. fa.* either principal, interest or costs; and

2d. Because the rule showed, on its face, that it was barred by the Statute of Limitations.

The Court overruled both grounds, and counsel for the Sheriff excepted.

The Court charged the Jury, that the Statute of Limitations did not commence to run in favor of the Sheriff, until the Sheriff caused notice to be given to the plaintiff or ~~his~~ attorney, of the collection of the money; that such notice must be shown by the Sheriff to have been given, and that the notice must be *actual*, not constructive, and that the law did not presume the money collected at the term of the Court to which the execution was returnable. To which rulings and charges of the Court below, counsel for Sheriff excepted.

The Jury returned the issue against the Sheriff, and the Sheriff moved for a new trial, on the following grounds:

1st. Because the Court erred in refusing to sustain the motion to discharge the rule, on the ground that said rule did not sufficiently set forth the *fi. fa.* on which it was taken, after issue joined.

2d. Because the Court erred in refusing to sustain the demurrer to the rule, on the ground that it showed, on its face, that the plaintiff's remedy was barred by the Statute of Limitations.

3d. Because the Court erred in deciding that the Statute of Limitations did not begin to run in favor of the Sheriff until notice was given to the plaintiff or his attorney, that the money was collected, and that the law did not presume notice at the term to which the execution was returnable.

4th. Because the Court erred in charging the Jury, that such notice must be actual, and that constructive notice was not sufficient.

5th. Because, since the rendition of the verdict, the Sheriff had discovered new, important and material testimony, to wit: that he was informed by one Nathan L. Atkinson, a citizen of said County, that he, the said Nathan, heard Gen. Hu. A. Haralson, plaintiff's attorney in the said *fi. fa.* say, that he, the said attorney, found, from memoranda in his possession, that the defendant (Sheriff) was entitled to a credit of \$40, paid on said *fi. fa.* in September, 1843, &c. which evidence was not known to the Sheriff until after the verdict was rendered.

The Court overruled the motion for a new trial, and the Sheriff excepted, and thus the case comes up for a review.

B. J. HILL, for plaintiff in error.

W. DOUGHERTY, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The Sheriff collected the money in this case, before the return term of the execution, as appears by his entries upon it. There is no doubt but that he is entitled to the protection of the Statute of Limitations. This is well settled. The only question made here is, at what time does the Statute commence to run in his favor? We are not called upon to say at what time the Statute commences to run in all cases where the Sheriff is liable to an action. Our judgment, now, is confined to the case made in this record. This was a rule to pay over money—it is a proceeding to compel him to pay money collected. The inquiry is the same that it would be if an action had been instituted for it. No question was made as to the form of the remedy. The rule is, that the Statute begins to run at the time when the defendant becomes liable to suit. We have, then, to determine at what time a Sheriff is liable to an action at the instance of the plaintiff in execution, for money collected. He is liable either from the time when he collects the money, or from and after a demand made, or after notice on his part to the plaintiff that the money is in hand. The presiding Judge ruled, that the Statute did not begin to run in his favor until he had given notice, actual notice, that the money was collected, and he must have so ruled, upon the ground that he is not liable to an action until the notice was given. Our opinion is, that it begins to run from the time when the money is, in fact, collected, because at that time we hold him liable to be sued for it. In cases where there is a claim to the fund, or any proceeding instituted which suspends it in his hands, the liability and rights of the Sheriff would be different. In a question between the plaintiff in exe-

cution and the Sheriff alone, as to the payment over of money collected, we mean to say, that the Statute will start from the time when it is collected. According to the exigencies of the writ of *fiery facias*, he is required to have the money in Court at the term next following the judgment. Such is ~~its~~ mandate to him. He is required to produce then the writ, with the money, and a return of his actings and doings thereon. If he does ~~this~~, his duty is fulfilled; and, in such case, if the money is paid ~~into~~ Court under its order, he would doubtless be discharged. But although he need not collect before that time, yet he is at liberty to proceed at once, after receipt of the execution, to a levy; and may receive the money at any time. Indeed, he defers a levy at his peril. If, then, he does collect the money before the return term, is there any law which relieves him from the obligation of paying it over at once? I know of none. He can pay it to the plaintiff in *fi. fa.* at once, and his receipt will be a protection. An order of the Court to pay to the plaintiff, when there is no contest about the fund, is not necessary for his protection; and if he does pay it, this is a part of his actings and doings which he ought to return. The law requires him to keep a docket of all his proceedings under each execution, which he is required to produce at Court, and which is intended to be a perpetual memorial and protection to him, as well as a warning and notice to the world. This is as good a law as any in the Digest, and yet it is pretty much a dead letter. The Courts ought to require its strict enforcement in every County in the State. When the money is collected, and the Sheriff enters the fact on the execution, as he did in this case, how stands the matter? Why thus: the Sheriff has in his hands so much money for the use of the plaintiff, and the entry is evidence of it. The Sheriff, because he is Sheriff, does not occupy a position more favorable than the position of any other person who has collected money for the use of another. I know there are cases of factors and others, where the holder of money is not liable to suit until demand made. This is not one of them. The receipt of the money makes the Sheriff the debtor of the plaintiff in execution, and he is bound to pay it to him by virtue of his office as

Sheriff. It is part of the business of his office to collect and to pay over money. When the money comes to his hands, the law implies a promise to pay it to the plaintiff, and upon that promise an action will lie. No demand is necessary. I am aware that in these cases, and in the analagous case of attorneys, the authorities as to demand are not uniform; but the weight of authority is, that no demand is necessary. If no demand is necessary, the liability depends upon the fact of receiving the money. Under this view of it, how can a notice to the plaintiff vary the matter? A notice, actual or constructive, by virtue of the return, may have the effect of showing that he has not used the fund—that he is acting in good faith, and will strip the plaintiff of all shadow of ground of complaint, if he lies by until the Statute bars his claim. But the liability of the Sheriff does not depend upon notice. It grows out of a promise which the law predicates upon the receipt of the money. Wherever there is a right on one side and a duty on the other, founded on a sufficient consideration, the law implies a contract between the parties, and an action will lie for its enforcement. 1 *B. & Adol.* 415. 3 *Ad. & Ellis, N. S.* 511, 526. *Dale vs. Birch*, 3 *Camp.* 347. *Longdille vs. Jones*, 1 *Starkie*, 845. *Brewster vs. VanNess*, 18 *Johns. R.* 133. *Dygert vs. Crane*, 1 *Wend.* 534. 2 *Philips' Ev.* 225. 3 *B. & Ald.* 696. *Chitty on Contracts*, 641. 4 *Wendell*, 675. *Cater, assignee, &c. vs. Stokes*, 1 *M. & Selw.* 600. *Stafford vs. Richardson*, 15 *Wend.* *Paley, Agency*, 71, note o. *Nisbet vs. Lawson*, 1 *Kelly*, 281. *Salk.* 9. See contra, 2 *Baily's S. C. R.* 51. 1 *N. & McCord*, 214.

If the plaintiff may proceed against the Sheriff at and from the receipt of the money, it is quite reasonable that he should be protected by the Statute. In no case is the bar of the Statute so little a hardship as in this case. The obligation of diligence is as great upon him as upon any other creditor, with better means of knowing his rights, and also of enforcing them. The execution itself and the entries upon it, are open to his inspection. The law requires the Sheriff at each term, to report to the Court, for his benefit, among other things, his actings on the execution; and if he fails to make return of what he has done,

the plaintiff can, by summary process of rule, at each and every term of the Court, require him to do so. He is presumed to be always present in Court, by his counsel. He need not, unless he wills it, be ignorant of the fact that his money is collected; and if he fails to proceed to collect it within the statutory term, he is without excuse.

[2.] The exception to the rule, that it did not sufficiently set forth the *fi. fa.* was taken on the trial of the issue, about eighteen months after the rule was filed, and when the parties were before the Jury. We think it came too late.

[3.] A new trial ought to have been granted on the ground of newly discovered evidence. The showing, in this regard, was within the rule. The evidence was not cumulative; for admitting that there was evidence as to a payment, yet there was none about the payment of the forty dollar item, about which the witness, Atkinson, heard Gen. Haralson make the admissions.

No question was made whether or not the Statute of Limitations would run against the Central Bank.

Let the judgment be reversed.

No. 76.—OTIS SMITH, plaintiff in error, vs. JOHN C. SIMMS, administrator of Thomas C. Brown, defendant.

[1.] A new promise may be inferred from the fact of part payment of a note within the six years; and this deduction is not only in accordance with the older cases, but is consistent, also, with the later and more approved decisions under the Statute.

[2.] In declaring on a promise, it need not be set out *in hæc verba*; it will be sufficient to state it according to its legal tenor and effect.

[3.] Under our Judiciary, *proferri in curiam*, is necessary to be made by the plaintiff, of any note or other instrument which is the foundation of the action.

[4.] To make an indorsement on a note by the holder of a payment admis-

sible evidence to rebut the presumption of the Statute, it must be shown that it was done by the privity of the promisor, or that it was entered when its operation would be against the interest of the party making it.

[5.] Upon such proof being given, it is good evidence for the consideration of the Jury.

[6.] If, however, the credit is small, compared with the amount of the debt, and entered just before the bar of the Statute would attach, although entered on to have been made at its date, still the Jury would be justified in finding against it.

[7.] After issue has been joined on the merits, it is too late to demur to the declaration, for want of profert of letters of administration.

[8.] Where a party confesses judgment against himself, under a mistake of fact as to what the pleadings contain; he may, upon discovering his error, retract the confession, provided it has not been recorded.

Assumpsit, in Troup Superior Court. Tried before Judge HILL, November Term, 1850.

An action of assumpsit was instituted by John C. Simms, as administrator of Thomas C. Brown, against Otis Smith, the plaintiff in error, on a promissory note made by Smith, and payable to Brown, for \$644 72, due the 17th day of January, 1843. On the note there was a credit of \$140, entered 1st day of January, 1845. The action was brought to the May Term, 1850, of Troup Superior Court, the process of the Clerk bearing date the —— day of —— 1850. The declaration, after setting out the note in the usual manner, alleged that, "In consideration thereof, afterwards, and in the lifetime of the said Thomas C. Brown, to wit: on the first day of January, 1845, the defendant undertook and faithfully promised to pay the said Thomas C. Brown, then in life, the sum of money in said note specified, according to the tenor and effect thereof."

The defendant pleaded the general issue, and the Statute of Limitations.

On the trial, the plaintiff offered in evidence the "entry of credit" on the back of the note, in order to take the note out of the Statute of Limitations.

Counsel for defendant objected, on the grounds—

1st. Because the declaration contained no allegation or count under which the evidence was admissible.

2d. Because the payment was not proved.

The Court overruled the first ground, and defendant excepted.

The plaintiff then proved the entry on the back of the note to be in the handwriting of Brown, the payee, and that Brown died in 1847. The Court admitted the credit in evidence, and counsel for defendant excepted.

The plaintiff having closed, counsel for defendant moved the Court for a non-suit, on the grounds—

1st. Because the *new* promise alleged was not established by *proof* of part payment.

2d. Because *part payment* was not proved—no privity of the obligor being shown.

3d. Because there was no *profert* of letters of administration in the declaration, and the plaintiff was not shown to be the administrator of Brown.

The Court overruled the two first grounds, and counsel for plaintiff admitting there was no *profert* of letters of administration in the declaration, the Court sustained the third ground; whereupon the counsel for plaintiff confessed a judgment for costs, reserving the right of appeal. Afterwards, and on the same day of the Court, and before the confession was recorded, the counsel for plaintiff informed the Court that there was a “*profert*” in an unusual part of the declaration, and moved the Court to revoke the confession of judgment. Counsel for defendant objected. The Court sustained the motion, and counsel for defendant excepted, and upon these several exceptions assigned error.

B. J. HILL, for plaintiff in error.

STEPHENS, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

John C. Simms, as administrator of Thomas C. Brown, de-

ceased, brought an action of *assumpsit* against Otis Smith, upon the following note :

“\$644 72.

“One day after date, I promise to pay T. C. Brown or bearer, six hundred and forty-four 72-100 dollars, value received. January 17th, 1843.

[Signed,] OTIS SMITH.”

On the back of the note was indorsed this credit—

“Received one hundred and forty dollars. January 1st, 1845.”

The defendant pleaded *non assumpsit*, and *actio non accrevit infra sex annos*.

On the trial, the plaintiff tendered in evidence the original note, with the credit. Defendant's counsel objected to the reading of the credit—

1st. Because it should have been declared on specially, if the plaintiff relied on it to take the note out of the Statute, it being barred on its face.

2d. Because the credit was not shown to have been indorsed on the note, by the privity of the maker.

The Court overruled the *first* objection and sustained the *second*. Was the Court right in overruling the first objection?

[1.] Ever since the case of *Whitcomb vs. Whiting*, (2 *Doug. Rep.* 652,) it has been held, that an acknowledgment or new promise may be inferred from the fact of part payment of a contract within six years; and this deduction is not only in accordance with the older cases, but also consistent with the later and more approved decisions under the Statute. *Perley vs. Little*, 3 *Greenl.* 97. *Porter vs. Hill*, 4 *Greenl.* 41. *Bangs vs. Hall*, 2 *Pick.* 374. *Whitney vs. Bigelow*, 4 *Pick.* 110.

[2.] This Court has never ruled that where the promise is made before the bar of the Statute attached, that it was necessary to declare on it, as the true course of action; but if such

was the law, we are inclined to think, that the averment in the writ, that the defendant "In the lifetime of the payee, to wit: on the first day of January, 1845, (the date of the credit,) undertook and promised to pay Brown, who was then in life, the sum of money specified in the note, according to its tenor and effect," was sufficient.

It is not necessary to spread out upon the record, the evidence upon which the party relies for a recovery; but the legal effect only of the contract sued on need be stated, and this is substantially done. I will not say that it would not be better, in all cases, to describe the payments, as well as the original indebtedness.

[3.] Under our Judiciary, *proferri in curiam* is necessary to be made by the plaintiff, of any note or other instrument which is the foundation of the action, and *oyer* is demandable, of right, by the defendant, and thus he can learn the truth of the transaction so far as the paper is concerned.

[4.] To meet the decision of the Court withholding the note from the Jury, because the indorsement was not proven to have been made with the privity of the debtor, plaintiff introduced William Dougherty, Esq. who testified, that he had often seen Thomas C. Brown, the plaintiff's intestate, write, and he believed the entry of payment on the back of the note to be in his hand. It was admitted that Brown died in 1847; whereupon the paper, with the credit, was admitted in evidence to the Jury. To which defendant's counsel excepted.

The admission of indorsements on notes and bonds, in the handwriting of the obligee or payee, as evidence to rebut the Statute of Limitations, arising from lapse of time, is founded on the supposition that no person will make a false statement against his own interest. But it must be *first* shown that the statement is *against his interest*, or else the foundation of the rule is wanting. Without evidence of its being against his interest, or, in other words, without evidence that the indorsement was actually made before the Statute of Limitations attached, it amounts to nothing more than a party's own testimony in his own cause, and that without the solemnity of an oath. Any one would be willing to

sacrifice a part of his demand to save the balance. Better to throw away a portion than lose the whole.

[5.] The correct rule, therefore, is laid down by the Supreme Court of New York, in *Roseboom vs. Billington*, (17 Johns. Rep. 182,) in which it was held, that an indorsement upon a note or bond, made by the payee or obligee, without the privity of the debtor, cannot be admitted as evidence of payment in favor of the party making the indorsement, unless it appears that it was made at a time when its operation would be against the interest of the party making it; and that when such proof is given, it is proper for the consideration of the Jury.

Here it is proven by the testimony of Mr. Dougherty, that the credit is in the handwriting of Brown, the payee—the sum bears a considerable proportion to the amount of the debt—and it is admitted, that Brown died two years before the Statute attached, according to the *face* of the note. It may be well said, that proof of this description is a kind of moral evidence, in regard to which no reasonable doubt can be entertained.

Coffin vs. Bucknam, (3 Fairf. Me. Rep. 471,) was a case precisely similar in all its features to the one before us. It was an action by an administrator on a promissory note, commenced more than six years after the note fell due, with an indorsement in the handwriting of the intestate, of a payment, purporting to have been made more than two years before the Statute of Limitations would attach, and six months prior to his death. It was held, that the Jury might regard this indorsement as the evidence of a new promise, though there was no other proof other than as above, of the time when said indorsement was actually made.

Weston, C. J. in delivering the opinion of the Court said, “The indorsement on the note in question was made by the plaintiff’s testator. Is there competent proof that it was upon a payment by the defendant? The indorsement must have been made before the six years had expired. At the time of the indorsment, the deceased was under no temptation to make it for the sake of evidence, as the Statute would not have attached for more than two years. The indorsement, then, was clearly against his interest—furnishing proof that he had received part of the con-

tents of the note. This never would have been done, if the sum indorsed had not been paid; and it could have been paid only by the defendant, or by some one authorized by him. These are inferences justified by common experience, and they are of a character to satisfy the mind."

[6.] I would merely add upon this head, that it is not every indorsement of this kind that would constrain a Jury to return a verdict for the plaintiff. If the credit was small in comparison with the debt due, and entered just before the bar of the Statute would attach, although proven to have been made within the six years, still the Jury would be justified in finding for the defendant.

The plaintiff having closed his case, defendant's counsel moved for a non-suit on all the grounds hereinbefore noticed, and because there was no profert of letters of administration, and plaintiff was not shown to be the legal representative of Brown.

The Court again overruled all but the last ground, and sustained that; and, thereupon, the plaintiff's counsel confessed judgment for costs, with liberty of appeal, which confession was allowed by the Court, written out and signed; but on the same day, and before the confession was recorded, or the papers delivered to the Clerk, the plaintiff's counsel informed the Court, that he had found the profert of letters in an unusual part of the declaration, and moved to retract his confession, made under a mistake of fact by all parties, which the Court permitted him to do, and the cause was submitted to the Jury. To which ruling counsel for the defendant excepted.

[7.] The objection for want of profert of letters of administration, came too late at the trial term, and after issue had been joined six months previously on pleas to the merit of the action. 1 *Chitty's Pl.* 453. *Champlin vs. Tilley and Tilley*, 3 *Day's Rep.* 305.

[8.] But be that as it may, we know of no rule of law which was violated by the permission granted by the Court to recall the confession, and re-instate the case on the trial docket. The mistake under which the confession was made, having been discovered before the papers were delivered to the Clerk, or the

confession recorded on the minutes of the Court. If the adverse party had dismissed his witnesses, or was otherwise surprised, he would have been allowed, no doubt, a continuance; but this he did not ask.

Approving, as we do, the ruling and decision of the Judge, for the reasons we have assigned, the judgment below is affirmed.

No. 77.—JAMES COKER, plaintiff in error, vs. WILLIAM S. BIRGE, defendant in error.

[1.] A nuisance is anything which worketh hurt, inconvenience or damage to another; as if one does an act, in itself *lawful*, which being done in a *particular place*, necessarily tends to the damage of another's property, it is a nuisance.

[2.] Where B was about to erect a livery stable, with a plank floor, on a public street in a city, upon his own land, for the purpose of keeping horses therein, within sixty-five feet of a public hotel, owned and kept by C, and C having applied for an injunction, alleging that the erection of the stable would cause irreparable injury to his property in said hotel, and result in the loss of health and comfort to himself and family, and in the loss of patronage to his hotel, in consequence of the unhealthy effluvia that will arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein: *Held*, that the erection of the stable at the place stated, would operate as a *nuisance* to the property of complainant, and that he was entitled to an injunction to restrain its erection.

Application for an injunction. Made to Judge STARK, at Chambers, and refused, December 23d, 1850.

The bill states that the complainant became the purchaser of the Griffin Hotel, on Broadway, in the City of Griffin, on the 12th day of November, 1850; that the property is chiefly valuable from the fact of its being a hotel, and that it had been occupied and kept open for that purpose since the year 1843, and

such was complainant's object in purchasing the property—the value of the property is stated to be \$3000 a year. The bill alleges that the defendant, about the 20th November, 1850, commenced building a livery stable, with a plank floor, on a lot immediately west, and adjoining the premises of the complainant, which defendant purchased after the complainant went into the possession of the hotel—the said stable fronting Broadway, and within about sixty-five feet of his said tavern—the object of the defendant being to keep and board horses.

The bill alleges, that if the defendant be permitted to complete the said building, and appropriate it to the purposes designed, that the injury to complainant and his family, as well as to his property, will be irreparable; that it will result in the loss of health and comfort to complainant's family, of patronage to his hotel, and in a ruinous depreciation of the value of complainant's property, in consequence of the unhealthy effluvia that will arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein; that the complainant requested defendant to desist from erecting said stable on the said premises, which he refused to do.

The prayer of the bill is for an injunction against the erection of the building.

After argument had, Judge *Stark* refused to grant the injunction, and counsel for complainant excepted.

ALFORD and MOOR, for plaintiff in error.

McCUNE, for defendant.

By the Court.—WARNER J. delivering the opinion. . .

This was an application to the Chancellor for an injunction to restrain the defendant from erecting a livery stable, fronting Broadway-street, in the City of Griffin, on the adjoining lot to the complainant's hotel, and within sixty-five feet thereof. The complainant had purchased the property expressly for a tavern, for which purpose it had been used since the year 1843, and

was, at the time of the application for the injunction, in the use and occupation of the complainant as such; that the property is chiefly valuable from the fact of the hotel being erected on it, and being kept for that purpose; that the defendant purchased the adjoining lot, on which he is about to erect the livery stable, after the complainant purchased the hotel and went into the possession of the same—the object of the defendant in the erection of said stable, with a plank floor, being to keep and board horses therein. The complainant also expressly alleges in his bill, that if the defendant be permitted to complete the said stable, and appropriate it to the purpose designed and intended, that the injury to him and his family, as well as to his said property, will be irreparable; that it will result in the loss of health and comfort to the complainant and his family, in the loss of patronage to his hotel, and in a ruinous depreciation of the value of his property, in consequence of the unhealthy effluvia that will arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein. According to this statement of facts, (which, for the purpose of obtaining the injunction, must be considered as true,) is the complainant entitled to the relief which he seeks by his bill? The object of the bill is to restrain the defendant from erecting a nuisance on his own land. What is a nuisance?

[1.] *Blackstone* defines a nuisance to be any thing that worketh hurt, inconvenience or damage. 3 *Bl. Com.* 215. The same author defines a private nuisance to be, any thing done to the hurt or annoyance of the lands, tenements or hereditaments of another. *Ib.* Speaking of nuisance to one's lands, the learned commentator, after enumerating several examples, says, "And by consequence it follows, that if one does any other act, in itself lawful, which being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will be less offensive. With respect to other corporeal hereditaments, he continues, it is a nuisance to corrupt or poison a water-course, by erecting a dye-house or a lime pit, for the use of trade, in the upper part of the stream; or, in short, to do any

act that, in its consequences, must necessarily tend to the prejudice of one's neighbor. So closely does the law of England enforce that excellent rule of Gospel morality, of doing to others as we would they should do unto ourselves." 3 Bl. 218.

[2.] The maxim of the law is, *sic utere tuo ut alienum non lædas*. The legal proposition then is, that if one do an act, of itself lawful, which being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will not be injurious or offensive. Taking the allegations in the complainant's bill to be true, the erection of the livery stable, by the defendant, on the adjoining lot to his tavern property, and within sixty-five feet thereof, fronting one of the most public streets in the City of Griffin, with a plank floor therein, will result in a ruinous depreciation of the value of his property, the loss of health to his family, and in the loss of patronage to his hotel, in consequence of the unhealthy effluvia that will arise from the stable, the collection of swarms of flies, and the interminable stamping of horses.

The erection of the stable, then, in the particular place stated, will work hurt, inconvenience, prejudice and damage to the complainant and his property, and is, therefore, in the eye of the law, a nuisance. To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. *Catlin vs. Valentine*, 9 Paige, 576.

But the Court below appears to have been of the opinion, that all these anticipated injuries were merely prophetic on the part of the complainant. The answer is, that the sworn allegations in the bill must be considered as a revelation of facts, so far as the judicial action of the Court was concerned. Nor are we prepared to say, if we were at liberty to travel out of the record, that the injuries which the complainant expressly alleges, will necessarily result to his property, from the erection of the stable, in the place stated, are at all improbable or unreasonable. If he had stood by and permitted the defendant to have erected his

stable, before making his application for relief, he would most probably have been too late, according to the ruling of this Court, in the *Water Lot Company vs. Brooks & Winter*, 5 Ga. Rep. 315. The allegations in the bill clearly make out a case of nuisance in our judgment, and the next question to be considered is, whether the complainant is entitled to relief in Equity, or whether he has an adequate remedy at Law? It is undoubtedly true, as urged on the argument, that it is not every case which will furnish a right of action against a party for a nuisance, which will authorize a Court of Equity to interfere by injunction. There must be such an injury as, from its nature, is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief, must occasion a constantly occurring grievance, which cannot be otherwise prevented but by an injunction. 2 *Story's Eq.* 204, §925. *Attorney General vs. Nichol*, 16 Ves. 341.

Is the injury here complained of such, as from its continuance or permanent mischief, must occasion a constantly occurring grievance? When the stable shall be erected, it will be permanent—the nuisance will continue to exist, not only from day to day, but from year to year, and the injury resulting from it will be constantly occurring. How shall the complainant obtain adequate damages at Law? Shall he be required to traverse the whole country, to ascertain by the testimony of witnesses, the number of customers kept away from his hotel by the offensive effluvia arising from the stable, or the interminable stamping of the horses kept therein, even if it were possible for him to do so? Customers stop at his hotel, and in consequence of the annoyance caused by the nuisance, they never return again, and, by their report of it, in distant parts of the country, others are prevented from stopping there, and his business is ruined. Will it be said he has an *adequate* remedy at Law to recover damages for this injury? To our minds, the difficulties which he would have to encounter in a Court of Law, would be insurmountable, to say nothing of the multiplicity of suits which would necessarily have to be instituted. The bill makes just such a case, in our judgment, which, from the very nature of the injury, is not

susceptible of being adequately compensated by damages in a Court of Law—it is a permanent, continuing mischief, which cannot be effectually redressed but by an injunction. The injury is material, and operates daily to diminish the value of the complainant's property, and to diminish, if not wholly to destroy, the comfort of himself and family.

Let the injunction be granted, and the judgment of the Court below reversed.

No. 78.—GEORGE REESE, plaintiff in error, *vs.* JUSTICE WYMAN and others, defendants in error.

- [1.] Chancery will exercise the power of reforming a written contract sparingly and with great caution, and only upon the clearest proof of the intention of the parties, and of the accident or mistake upon which the jurisdiction is invoked.
- [2.] Chancery will reform a written contract, upon proof that the writing does not exhibit the contract as it was agreed upon by the parties at the time, and that the parts omitted were omitted by accident, mistake, inadvertence or fraud.
- [3.] If one in treaty with another for the sale of property, misrepresents a material fact, stating it to be true, when at the time he knows it to be false, and the other party trusts to the statement and acts upon it, it is a positive fraud, for which Equity will rescind the contract.
- [4.] Such a fraud may be perpetrated by acts as well as by words, and by any artifices designed to mislead.
- [5.] Whether a party thus misrepresenting a fact, knows it to be false or not, is wholly immaterial.
- [6.] When a party thus affirming a fact which is false, believes it to be true, it is not a fraud in fact, but a fraud in Law.
- [7.] And if a party innocently, by mistake, misrepresents a fact which is material, and to which the other party trusts, it is cause for rescinding the contract, because it operates as a surprise upon him.

In Equity, in Troup Superior Court. Tried before Judge HILL, November Term, 1850.

This was a bill in Equity, filed by the plaintiff in error against the defendants. The bill alleged, that the defendants, on the 29th of December, 1837, were united and associated as co-partners, under the name and style of the "West Point Company," and as such were the owners of a town, laid off into lots and streets by them, on the Chattahoochee river, in the County of Troup, known and called West Point; that on the 28th of September, 1837, they advertised said lots for sale, stating in the notice, that "It was certain the Montgomery & West Point Railroad would be completed in a short time." The bill alleged, that the defendants were stockholders, and exerted a controlling influence in the affairs of said railroad company, and complainant relied, with the utmost confidence, in the representations and assertions of the defendants; that the complainant, knowing that the value of the lots in the said town, depended on the completion of the road, declined to purchase the same, without a distinct understanding as to what should be done in the event said road should not be completed.

The bill alleged, that on the day of sale, John C. Webb, one of the proprietors, and as the agent of the company, in order to induce the purchasers to buy, stated, that the company would, in the event said railroad was not completed to West Point, refund the purchasers of said lots the purchase money they were required by the terms of sale to pay, with interest thereon from the time of payment; that on the day of sale, 11th December, 1837, they sold a great many lots, with the understanding as charged. Afterwards, on the 29th day of December, 1837, complainant purchased of John C. Webb, as the agent of the company for that purpose, two lots, at private sale, on the same terms and understanding, as those published and made known on the day of sale, and received the bond of said company for titles, which was printed and prepared the day before the day of sale, and was in the ordinary form. Complainant paid a part of the purchase money for the said lots.

The bill charges that the railroad has not been completed to the town of West Point, and that it never will be; that the charter has been forfeited to the State by the terms thereof, and

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the road sold under execution, and become the property of other stockholders, in consequence of which, the said lots had become of no value; that on the 1st day of May, 1844, complainant demanded of the agent of the company, the purchase money paid by him for said lots, and offered to deliver up the bond to be cancelled, which he refused to do.

The bill prays that the contract for said lots may be rescinded, that the defendants refund the purchase money paid, with interest, and deliver up to be cancelled, the notes of complainant held by said company, and that they have their bond held by complainant; also, that the said bond may be reformed, so as to contain the stipulations of the parties as set forth in the bill.

The defendants, by their answer, admit the sale of the lots, on the following terms: one-fourth of the purchase money to be paid on the 1st day of March, 1838, one-fourth 1st March, 1839, and the other half when the first steam car should run from Montgomery, in the State of Alabama, to West Point. They deny that it was stipulated to be completed at any particular time, and allege that the road is now in progress of completion, and will be finished to West Point in a short time.

McGehee, one of the defendants, denies that the "West Point Company" owned a majority of the stock, or had a controlling influence in said railroad company.

On the trial of the cause, it was proved by several witnesses, that on the day of sale, the representations as charged in the bill were made; that it was publicly proclaimed that the said railroad would be completed in a short time; that Webb and McGehee, two of the company, represented that it would be finished by the year 1844, &c. &c.

The Court charged the Jury, "That the contract under consideration was sought to be set aside—

"1st. By reformation and non-performance on the part of defendants with their part; and

"2d. For fraud in procuring the agreement of complainant, by misrepresentation, concealment and fraud, *and the contract thus induced.*

"In order to find in favor of complainant on the first ground,

the Jury must be convinced, *beyond a reasonable controversy*, that by reason of said accident, mistake or inadvertence, the contract was reduced to writing, in form and in substance different from the intention of the parties, as to *facts* or *law*, and that a mistake of fact or legal right, (clearly proven,) might be corrected; but on the second ground, if the Jury believed that plaintiff was induced to make the contract by false or fraudulent misrepresentations, or concealment of truth, whether made honestly or dishonestly, with or without knowledge, intentionally or innocently, (inasmuch as fraud vitiates all contracts,) if the complainant was really imposed upon by any artifice or misplaced confidence, the contract ought to be set aside, and the parties placed in *statu quo*, or as they were, the money refunded, and notes given up according to complainant's prayer; that the Court would leave *special application of rules* to be made to the present case by the Jury. Upon these two points the case turns, *or one of them*. If either found for complainant, his prayer ought to be granted; otherwise, a finding for defendants generally. To reform a contract, there must be no doubt left of what the *real contract* was, and then (as to time, place and circumstances) it must be construed and reformed according to the intentions of the parties. If left doubtful in terms, the Jury should not attempt reformation, but bind the parties by the terms of the writing."

The Jury found for the defendants, and counsel for complainant excepted to the charge of the Court, and his refusal to charge.

W. DOUGHERTY, for plaintiff in error, cited—

Story's Eq. Jur. §§162, 192. 1 *Kelly*, 25. *Simpson vs. Vaughn*, 2 *Atk.* 33. 6 *Serg. & R.* 262. *Thomas vs. Frazer*, 3 *Ves.* 399. 2 *Kent*, 486, '87, note. *Hunt vs. Rousmanier*, 8 *Wheat.* 174. 3 *Atk.* 386. 11 *Mees. & Wels.* 401. 2 *Wheat.* 178, 195. 6 *Clark & Fin.* 232, 233. 11 *Ala. Rep.* 535, 1058.

O. A. BULL, for defendants in error, relied on—

1 *Story's Eq.* §§152, 157. *Ib.* 162. 1 *Bro. Ch. R.* 338, 341. 1 *Ves.* 317. 7 *Ib.* 217. 2 *John. Ch. R.* 585. *Ib.* 630. 2 *Cranch.* 442. 1 *Story's Eq.* §§200, 203. 7 *Johns. Ch. Rep.* 201. 1 *Simons' R.* 63.

By the Court.—NISEBET, J. delivering the opinion.

Numerous requests to charge were made by the counsel for the plaintiff in error in this case, which the presiding Judge declined to give, and the charge which he did give, and his various refusals to charge as requested, are excepted to. That part of the charge copied into the Reporter's brief, contains what the Court did rule, and covers all the points really made in the case. If the Court was right in this instruction, he was right in not instructing as requested. Our opinion is, that the law applicable to the case, and growing out of it, was correctly given to the Jury, and I do not, therefore, find it necessary to follow the assignment in its numerous specifications. This is a bill to reform a contract, and when so reformed, to have it annulled, and the parties reinstated in their original position, because of non-performance on the part of the defendants. That is to say, the bill charges, that the contract, reduced to writing, is not the contract made between the parties. It sets out what the true contract was, and claims that, according to the true contract, the defendants have not complied with their stipulations, and the prayer is, that it be cancelled, and the amount paid under it by the plaintiff be refunded to him. To understand the true point at issue between the plaintiff in error and the Court below, it will be necessary to refer with greater particularity to the facts. The defendants being owners of the land, laid out the town of West Point, in anticipation of the completion of the railroad from Montgomery, Alabama, to that place, and advertised the lots for sale. The bill charges, that it was stated in the advertisement, that "It was certain that the Montgomery & West Point Railroad would be completed in a short time;" and that the defendants were stockholders in the railroad company, and exerted a controlling influence in the affairs of that company;

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that on the day of sale, John C. Webb, one of the proprietors of the West Point lots, and acting as agent for the others, stated, that in the event that the railroad was not completed to West Point, they would refund to the purchasers the amount of the purchase money, which by the terms of the sale they were required to pay, with interest from the time of payment. The terms of sale were, one-fourth of the purchase money to be paid on the 1st of March, 1838, one-fourth on the 1st of March, 1839, and the other half when the first steam car should run through from Montgomery to West Point—notes for the purchase money, and a bond for titles when the whole was paid. The bill also charges, that the railroad has not been completed to West Point, and never will be, for that the charter has been forfeited to the State, and the road sold under execution, and has become the property of other stockholders; that the complainant has paid a part of the purchase money, &c. &c. It avers farther, that the complainant did not buy at the public sale, but bought two of the lots at private sale, eighteen or twenty days thereafter, *upon the terms of the public sale*. It charges that it was agreed and understood, that he was to take the lots upon the same terms and conditions with those who bought at public sale. He executed his notes for the purchase money, and took the defendants' bond for titles, conditioned for titles to be made when the whole of the purchase money was paid. Now, the complainant comes into Equity and asserts that the contract was, in addition to what appears in writing, that if the *railroad* should not be built to *West Point*, they, the defendants, would refund the purchase money, with interest, and asks that it may be reformed in that particular. The defendants plant themselves upon the contract as it appears in writing, and deny that it is a case where Equity will interfere. It is thus manifest how the question is made. The position of the complainant is, that he having purchased upon the terms and conditions of the public sale, and having proven that those terms and conditions were different in the material particular stated, from the contracts as reduced to writing, he is entitled to have his rights adjudicated according to the terms and conditions as proven. The reply of the defend-

ants is, the writing is the highest and best, and, in fact, the controlling evidence of what was the contract at the time it was made, and cannot be varied, unless it appears that, by mistake or fraud, something was omitted in the writing which it was, *at that time*, agreed to be inserted in it.

[1.] The Court, throughout all the various instructions which he was called upon to give, consistently held to this position of the defendants, and we must say, so held in accordance with the law of the case. The Court states the general proposition to the Jury thus—"In order to find for the plaintiff on the first ground, the Jury must be convinced beyond a reasonable controversy that, by reason of accident, mistake or inadvertence, the contract was reduced to writing, in form and in substance different from the intention of the parties as to facts or law, and that a mistake of fact or legal right (clearly proven) might be corrected." The distinction insisted upon, all through the case, by the presiding Judge is this, that the fact that at the sale, the terms were such as are claimed by the complainant, although he claims in his bill to have purchased upon those terms; will not, of itself, authorize the written contract, executed some eighteen or twenty days thereafter, to be reformed; but to justify the reform, it must be proven that the term or condition claimed to be omitted, was a part of the agreement made between the parties at the time the contract was reduced to writing, and was omitted in the writing, *at the time of its date*, by accident, mistake or inadvertence. This distinction is embraced, it is true, in that portion of the instruction copied in the Reporter's brief, and which I have copied above, but is elsewhere expressly made by the presiding Judge. It is the distinction which controls the question. Here is a contract, evidenced in writing, bearing date on the 29th day of December, 1837. The written evidence is the notes of the complainant for the purchase money—one-fourth payable on the 1st March, 1838, one-fourth on the 1st March, 1839, and the other half when the first steam car should run through from Montgomery to West Point—and the bond of the defendants to make titles to the complainant when the last payment of the purchase money is made. This is what is exhibited

as the contract between these parties, reduced to writing on the 29th December, 1837. It is charged in the bill, that in addition to what these writings exhibit, it was then and there agreed, that if the Montgomery Road was not completed to West Point by a stipulated time, the defendants would refund to the complainant the purchase money which he might at that time have paid; that is, that it was then and there agreed, that the plaintiff should have his lots upon the terms of the sale at auction on the 11th day of December, preceding; one of which terms was, that the purchase money should be so refunded. The complainant did prove that such was one of the terms of the public sale, *but he did not prove the vital fact, that he bought on the 28th December, (as he states in his bill,) upon the terms of the public sale on the 11th of December.* It was argued that this was proven inferentially, by proof that this was a condition of the sale in public, so announced by the defendants; that others bought in private upon such terms and some other like circumstances. But all that will not do. The defendants might have sold to others upon this condition at the public sale, or in private, but here is the complainant's contract, in writing, which contains no such condition. The writing is *his* contract—by that he is estopped—he has submitted himself to be bound by it; and the Court is legally bound to hold it as really and truthfully *his* contract, unless he does show, by proof, that it was really and truthfully different in this; that it was agreed that if the road was not completed to West Point by a time certain, the purchase money should be refunded, and that that condition was omitted to be inserted in the writings, by accident, fraud, inadvertence or mistake. Clearly the contract in writing is one contract, and the contract at the public sale is another contract.

[2.] Equity will enforce a contract as the parties made it, although it be reduced to writing, if, by reason of accident, fraud, mistake, or even inadvertence, the writing does not exhibit it really and truly as the parties made it. But Equity will not make a contract for the parties, or allow them to set up a contract in anywise different from that which they have made. And it is a clear rule of evidence, that when a contract is reduced to writ-

ing, the writing is the highest evidence of it, and is, in general, absolutely controlling, yet not universally; for Equity holds control over the writing, so as to relieve against accident, fraud or mistake. The conditions precedent to Equity's interfering with a written contract are, that it be made to appear that the contract was different from what the writing exhibits it; and that it does not truthfully appear by reason of accident, fraud or mistake. If such guards were not thrown around the power of Chancery to interfere with written contracts, the whole benefits of the Statute of Frauds, requiring contracts for the sale of lands to be in writing, and of the rule, generally, that the writing indicates the mind and intent of the parties, and is the best evidence, would be lost. The case, then, which this record presents, is an attempt, not to reform a contract, but to set up a different contract. The ruling of the Court is in accordance with these views, and according to authority. This doctrine as to the power of a Court of Chancery to reform contracts, having been several times before this Court, and maturely considered, it would be perfectly useless labor to review the authorities in relation to it. Among other things we have held, that this jurisdiction will be exercised very sparingly, and with great caution, and only upon the clearest proof of the intention of the parties, and of the mistake or accident upon which it is invoked. *Rogers vs. Atkinson*, 1 *Kelly*, 12. *Trout vs. Goodman*, 7 *Ga. Rep.* 383.

[3.] Independent of this ground, it is asked in the complainant's bill, that the contract be rescinded, on the ground of fraudulent representations made by the defendants at the sale, and the Court below and the counsel for the plaintiff in error, are at issue as to the law which governs that matter. The Court instructed the Jury, that "If they believed that the plaintiff was induced to make the contract by false or fraudulent misrepresentations, or concealment of truth, whether made honestly or dishonestly, with or without knowledge, intentionally or innocently, (inasmuch as fraud vitiates all contracts,) if the complainant was really imposed upon by artifice or misplaced confidence, the contract ought to be set aside." The position of the plaintiff in

error is, that if false representations were made, the contract will be set aside, whether he relied upon them or not, and even when the parties met to treat about the purchase, upon equal terms. To set aside a contract on this ground, the buyer must be misled or deceived by the false representations of the seller, in fact, acting upon them; and if the parties come together to contract under unequal terms—under circumstances which show that the buyer reposes confidence in the seller, and there is fraudulent representation or concealment, the inequality in the position of the parties will be sufficient proof that the confidence is reposed. If the representations are false, and the party making them knows them to be so, and the other party trusts to the statements, and acts upon them, it is a positive fraud.

[4.] This fraud may be perpetrated by acts and artifices designed to mislead, as well as by words.

[5.] And it is, farther, immaterial that the party making the representations is ignorant whether they be true or false; for the affirmation of what one does not know to be true, or believe to be true, is equally, in morals and in law, as unjustifiable as the affirmation of what is known to be positively false.

[6.] In case, however, the representations are believed to be true by him who makes them, it is not, then, a fraud in fact, but is, nevertheless, a fraud in law.

[7.] So, if a party innocently or by mistake misrepresent a fact which is material, and to which the other party trusts, it is good cause to rescind the contract, because it operates as a surprise. In all these cases, the party seeking to set aside the contract, must trust to the representations, and act upon them; and if the parties come together to treat upon unequal terms, it will be presumed that the person injured trusted to and acted upon the representations. There are cases, however, where false representations will not rescind the contract. They are cases where the parties are upon equal terms, and where it is manifest, from all the circumstances, that the buyer does not act upon the opinions or representations of the seller, but upon his own judgment. These positions are very important, and would require at my hands, in this case, careful and extended discussion, but

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for the fact that they have received the best consideration of this Court in the case of *Smith & Shorter vs. Mitchell*, 6 Ga. Rep. 458. According to the principles stated, the Court was right, and these are all the points relied upon.

Let the judgment be affirmed.

No. 79.—JOSEPH C. BEVERLY and WM. McBRIDE, plaintiffs in error, *vs.* JOHN BURKE, defendant in error.

- [1.] The registration of a bond for title to land not being authorized by law, does not entitle it to be read in evidence, without proof of its execution. *Aliter*—if thirty years old, accompanied with proof of possession under it, or if produced pursuant to notice from the opposite party, he claiming also an interest under it.
- [2.] *Color* of title defined.
- [3.] Though the title of an adverse possession be ever so defective, yet the true owner must sue within seven years, or he is barred by his entry.
- [4.] Against a claim for *mesne* profits in the nature of damages, the value of the improvements made by the defendant is a fair set-off, provided he took possession of the premises *bona fide*. *Trespassers* are not entitled to the benefit of this principle, except where the profits of the premises have been increased by the repairs or improvements which have been made. In that case, it is proper for the Jury to take into consideration, the improvements or repairs, and diminish the profits by that amount; but not below the sum which the premises would have been worth without such improvements or repairs.
- [5.] Whether the defendants are trespassers, is a question of fact to be submitted to the Jury.
- [6.] A copy deed established according to law, is to be taken in lieu of the original, for all purposes whatsoever.
- [7.] If the original deed was never recorded in the County where the land lies, the copy, unless registered, cannot be read in evidence without proof of its execution.
- [8.] The fact that it was recorded on the *minutes* of the Superior Court in the course of the proceeding instituted for its establishment, does not dispense with the statutory requirement of registration.

- [9.] A judgment which is void for want of jurisdiction in the Court rendering it, cannot of itself be noticed for any purpose.
- [10.] The 47th Common Law, Rule of Practice, requiring testimony taken by commission to be communicated to the adverse party before the cause is called for trial, is *directory* merely.
- [11.] The question of *adverse possession*, is not for the Court to decide, but exclusively for the Jury.
- [12.] For the presiding Judge to charge the Jury that the plaintiff's possession is "*uninterrupted, continuous, notorious, sufficient and adverse*," is error, and in which, under the Act of the Legislature of 1849-1850, a new trial *must* be granted.
- [13.] How far and to what extent the *occupant* will be protected in his possessory title.

Ejectment in Fayette Superior Court. Tried before Judge HILL, September Term, 1850.

This was an action of ejectment, brought by the defendant in error, for the recovery of lot of land, No. 67, in the ninth district of Fayette County; the said lot being divided by the County line of Campbell and Fayette Counties. The plaintiff relied upon a statutory title. The defendants pleaded the general issue, Statute of Limitations, and want of title in the defendant in execution under which the land was sold at the time of sale—the plaintiff claiming title under the Sheriff's deed.

On the trial the plaintiff offered in evidence a bond for titles, from Henry Reeves to Thomas Steel, which had been admitted to record—to which plaintiff objected, on the ground that the bond was not admissible without proof of its execution. The Court overruled the objection and permitted the bond to go to the Jury as color of title. The plaintiff also offered in evidence a deed from the Sheriff of Campbell County, for the land in dispute, to which the defendants objected.—1st, Because the *fi. fas.* under which the land was sold, were not produced; 2d. Because the deed being for the whole lot, a part of which was in Fayette and a part in Campbell Counties, was void as to that part lying in Fayette County. The Court admitted the deed to be void as to that part of the land in Fayette County, but admitted it in evidence, as color of title.

Defendants sought to prove by a witness of plaintiff, that the improvements made on the land were worth as much or more than the value of the rent. Plaintiff objected, on the ground that the defendants were trespassers.

The Court sustained the objection and would not permit the witness to answer.

The defendants offered in evidence a copy of a deed from Henry Reeves to Edmund Baughan, for the land, which copy deed had been duly established and recorded in *Fayette Superior Court*. The plaintiff objected to its admissibility, on the ground that it was necessary to prove the execution of the original deed—the same not having been recorded in Fayette County. The Court sustained the objection and excluded the evidence.

The defendants offered in evidence an exemplification of an action of ejectment, tried in Campbell Superior Court, in which Edmund Baughan was plaintiff, and John S. Heard tenant in possession, and John Burke was a co-defendant, and in which there was a judgment of recovery for the whole lot, both that part lying in the County of Campbell and that in the County of Fayette.

The plaintiff objected to the admissibility of the evidence, and the Court sustained the objection and excluded it.

The defendants offered in evidence the answers of Hilliard Baughan to interrogatories which were received in Court from the defendant, in the usual way, after the case was submitted to the Jury.

Plaintiff objected to the answer being read, on the ground that the interrogatories had not been tendered to the plaintiff before the cause was submitted to the Jury. The objection was sustained by the Court.

In his charge to the Jury, Judge *Hill* “expressed his opinion to the Jury, that the evidence of plaintiff made out a case of uninterrupted, continuous, notorious, sufficient and adverse possession of seven years.”

To which several rulings and decisions of the Court, counsel for defendants excepted.

MOORE, LATHAM & STELL, for plaintiffs in error.

CONNER & STONE, DOYAL & NOLAN, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an action of ejectment, brought by John Burke against Joseph C. Beverly and William McBride, to recover a part of lot of land No. 67, in what was originally the 9th district of Fayette County. The plaintiff relied upon a statutory title.

[1.] He tendered in evidence, a bond for titles from Henry Reeves to Thomas Steel, under which he claimed. Counsel for the defendant objected to the introduction of this paper without proof of its execution. The plaintiff relied on its registration, and the Court admitted it to be read, as color of title.

There is no law authorizing this private writing to be recorded. The fact of registration does not entitle it, therefore, to be received in evidence for any purpose, without proof of its execution. Had this instrument been thirty years old, and testimony adduced that it had been acted upon, or that the obligee took possession of the premises in dispute under it; or had it been produced by the adverse party, pursuant to notice, the defendant also claiming an interest under it, no proof of its execution would have been required.

The plaintiff next offered in evidence a Sheriff's deed to the land, to which defendant's counsel objected, on two grounds—

1st. Because the executions under which the property was sold, were not produced.

2d. Because the deed conveyed the entire tract, part of which was situated in Campbell County, and a part in Fayette; and it was insisted, that the Sheriff of Campbell had no authority to sell land in Fayette.

The Circuit Judge admitted that the deed conveyed no title to the land in Fayette, but held, that it was good to show color of title to the whole.

[2.] What is meant by *color of title*? It may be defined to

be a *writing*, upon its face *professing* to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law.

The very fact of setting up a statutory title, excludes the idea of a rightful or legal title. The length of the possession, and its nature and character, are the only tests.

[3.] In *Jackson vs. Ellis*, (13 *Johns. Rep.* 120,) the Court said, "That it had been repeatedly ruled, that an entry under *color of title* is sufficient to constitute an adverse holding. It is not necessary for this purpose, that the title under which such entry is made, should be a good and valid title." In *Clapp vs. Bornaghann*, (9 *Cowen*, 530,) Ch. Jones says, "Though the title of an adverse possession be clearly defective, yet the true owner must enter within twenty years, (in Georgia within *seven*,) or he is barred his entry." And in *Jackson vs. Woodruff*, (1 *Cowen*, 276,) *Woodworth*, Justice, says, "If the title is bad, it is of no moment." It is needless, I presume, to multiply authorities to this point. **They all speak** the same language, and fully sustain the decision of ~~the~~ **Circuit** Court.

[4.] ~~Counsel~~ for the defendant interrogated a witness, (Holcomb,) as to whether the buildings erected upon the land by the defendant, were not worth as much or more than the rent? Plaintiff's counsel objected to the question, upon the ground ~~that the~~ defendants were *trespassers*, and as such, were not ~~allowed~~ to set up the value of their improvements against the ~~same~~ profits. The Court sustained the objection, and refused to permit the witness to testify.

Under certain circumstances it might be proper to allow proof as to improvements, even when made by acknowledged trespassers. If, for instance, the profits of the premises have been increased by repairs, it is proper for the Jury to take into consideration these repairs, and to diminish the profits by them, but not below the amount which the premises would have been worth without such repairs. Beyond this, perhaps, it would not be proper to go in favor of trespassers; for it would be against all

principle to allow a trespasser to make the person trespassed against his debtor, for improvements made without his consent and against his will, or to suffer him to set them off against damages to which he has justly subjected himself by reason of his trespass. This would be worse than permitting him to set-off one trespass against another. It would be suffering him to justify or excuse one trespass, by proving that he had committed another—for the act of improving is itself a trespass.

[5.] But the complaint in this exception is, that the Court, for the purpose of excluding Holcomb's testimony, *assumed* that the defendants were trespassers, a denial of which constituted the gist of their defence, and was certainly a question of fact to be submitted to the Jury, under the direction and opinion of the Court, as to the law which the evidence before them might involve. 2 *Wash. C. C. Rep.* 165. 8 *Dana*, 65, 66.

[6.] The defendant's counsel offered in evidence, the copy of a deed from Henry Reeves to Edmund Baughan, to the lot of land in controversy, which had been duly established in Fayette Superior Court, in lieu of the lost original, *and recorded in Fayette Superior Court*. This copy deed was rejected on the ground, that the original deed not having been recorded in Fayette, it was necessary that the execution ~~should~~ be proven by the subscribing witnesses. There can be no doubt that when a copy deed is established, that it is to be treated as the original, for all purposes whatsoever.

[7.] But here the original deed was never recorded in Fayette County. If produced, it could not be read in evidence without proof of its execution. The copy, therefore, ~~could not~~ be entitled to no greater privilege.

[8.] The fact that it was recorded in the minutes of Fayette Superior Court, in the course of the proceeding which was instituted for its establishment, did not dispense with the statutory requirement of being registered by the Clerk of the Superior Court of Fayette County, in the book kept by him for the registration of deeds.

[9.] The defendant's counsel offered in evidence, the exemplification of a suit in Campbell County, and of a judgment ~~in~~

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covered thereon, for lot No. 67, in which John Burke, the plaintiff in the present action, was a co-defendant. The defendant did not claim that Burke could be estopped by this judgment of former recovery, as to so much of the land as was situated in Fayette County. He contended, however, that inasmuch as the title under which the recovery was had in Campbell County, covered the entire lot, that it was notice to Burke of an adverse claim to the part in Fayette; but the Court ruled out the testimony, and we think rightly.

By the Constitution of this State, titles to land must be tried where the land lies. The Court in Campbell, then, had no jurisdiction over so much of lot No. 67, as lay in Fayette. The whole proceeding, as to that, was a nullity; and the exemplification of it was inadmissible, *ex suo vigore*, to prove notice or any thing else. We will not say that the original papers might not have been produced, not as the pleadings in the cause, but as *writings* merely, and service of them proven by the officer, *as an individual*, for the purpose of charging Burke with notice of this adverse claim; but the record, *per se*, or a copy of it, professes no inherent efficacy to effect this object, for want of jurisdiction in the Court.

[10.] The defendant's counsel offered in evidence, the answers of Hilliard Baughan to interrogatories, which were excluded by the Court, on the ground that they were not communicated to the opposite party before the cause was submitted to the Jury.

The 47th Rule of the Superior Courts provides, "That all objections to the execution and return of interrogatories on appeal trials, the form of the commission or service of notice must be made by the party seeking to avail himself of them before the cause has been submitted to the Jury, or they will not be heard by the Court, provided that the said interrogatories have been twenty-four hours in the Clerk's office; and if they have remained in the possession of the party intending to use them, they shall be communicated to the adverse party before the cause is called for trial." 2 Kelly, 475.

What is the correct interpretation of the concluding clause

of this rule? Can the party be considered in default under it, unless his interrogatories have been called for? And admitting that it was his duty voluntarily to tender them, does a forfeiture in this respect involve, as a penalty, the exclusion of the testimony? Such, we apprehend, could not have been the intention of the Judges, in framing this Rule of Practice. For if so, we respectfully submit, that it would be in direct conflict with the Statute authorizing testimony to be taken by commission; for the Act declares, that the examination of the witnesses, taken pursuant thereto, *shall be heard* on the trial of the cause, on motion of either party. *Prince*, 425.

The construction then, we put upon this rule is, that it is *directory* merely. It gives to parties the right to call for the exhibition of all the testimony taken by commission, before the cause is called for trial; and, consequently, makes it the duty of the Court to compel its production. If this is not done from inadvertence or design, the party holding the interrogatories in his possession, goes to trial at his peril—it being competent for the adverse party, when the interrogatories are offered during the progress of the trial, to take any exception to their execution or return, to the form of the commission, service of the notice, ~~any~~ any other defect. It remains only to dispose of the last exception.

[11.] The presiding Judge charged the Jury, “That the possession of the plaintiff was uninterrupted, continuous, notorious, sufficient and adverse.”

All the authorities concur in holding, that the question of *adverse possession* is not for the Court to decide, but exclusively for the Jury. 2 *Cain. Rep.* 168, '69. 1 *East.* 568. 1 *Burr.* 397. 2 *Cranch*, 184. 12 *Johns. Rep.* 242, 357. 8 *Ib.* 495. 7 *Ib.* 5. 1 *Cowp.* 103, 217. 5 *Johns. Rep.* 467. 1 *Johns. Cas.* 289. 11 *Johns. Rep.* 446. 2 *Bac. Abr.* 529. 14 *Johns. Rep.* 304, 307. 9 *Ib.* 102, 174. 10 *Ib.* 334, 377, 380, 417, 475. 11 *Wheat.* 276, 199, 209, 59, 75. 2 *Bay. Rep.* 483. 2 *Serg. & Rawle's Rep.* 527.

[12.] The Act of the last Legislature declares, “That from and after its passage, it shall not be lawful for any or either of the Judges of the several Superior Courts of this State, in any

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Court, (meaning *cause*,) whether civil or criminal, or in Equity, during its progress, or in his charge to the Jury, to express or *intimate* his opinion as to what has or has not been proved, or as to the guilt of the accused."

And by the second section it is enacted, "That should any Judge of said Superior Courts violate the provisions of the first section of the Act, it shall be held by the Supreme Court for the correction of errors in this State, to be reversed, and a new trial granted in the Court below, with such directions as they may lawfully make." *Pamphlet Laws of 1849, 1850, p. 271, '72.*

Upon this ground, then, we are left without discretion. The judgment must be reversed, and a new trial awarded.

[12.] I have forbore to discuss a point much mooted in the argument, as to what constitutes adverse possession. In *Conyers vs. Kenan and Hand*, (4 *Kelly & Cobb*, 308,) some remarks were made as to how far, or to what extent the occupant would be protected in his possessory title. I see no reason to modify the opinion there expressed.

No man in this country cultivates his whole tract of land. It is very unusual to inclose the whole. Good husbandry forbids that the whole should be planted. One possession is usually well defined by the boundaries of those which surround it, and frequent acts of ownership over the parts not cultivated or inclosed, give notoriety to the possession of the whole. Nothing but want of due diligence and care, under such circumstances, can deprive the rightful owner of his property. Whether the log pen used occasionally for a grocery, on one side of this unsettled tract of land, with the fragments of old casks in it, constitutes such an adverse possession to the whole, as to give effect to the Statute of Limitations, it would be premature at present to decide.

No. 80.—Jno. DENNIS and others, plaintiffs in error, vs. SAMUEL J. RAY, receiver, defendant.

- [1.] Where a bill alleged that there was a debt due on a judgment by the copartnership firm of E. W. & J. Dennis, in favor of the Central Bank of Georgia, and that a *fi. fa.* had issued thereon, which had been paid off by Thomas Crutchfield, and Gregory J. Turner, as indorsers; and upon the trial of the cause a *fi. fa.* was offered in evidence in favor of the Central Bank of Georgia, against E. W. Dennis, as *principal*, and John Dennis, Thomas Crutchfield, and Gregory J. Turner, as indorsers: *Held*, that the *fi. fa.* was properly rejected on the ground of *misdescription*, there being no offer to amend the bill so as to make the *allegata* and *probata* correspond.
- [2.] As a matter of practice, this Court will not control the discretion of the Court below, in refusing to suspend a cause then on trial, for the purpose of taking up another cause, to permit a defendant's answer thereto to be filed, so as to make it evidence, as an answer in the cause then on trial, especially when the party who had answered was dead, and there were objections raised to its being filed.
- [3.] The answer of one copartner to a bill in Equity filed against the copartnership, which contains admissions against the interest of the company, although not filed as an answer in the cause, may be read in evidence as a *written admission* against the copartnership, on due proof of its execution.
- [4.] Where goods have been purchased in the name of and on the credit of a copartnership firm, and turned over to another copartnership firm, ~~owned~~ *owned* of some of the same individuals, without any *bona fide* or *valuable consideration* being paid therefor: *Held*, that a Court of Equity will aid the judgment creditors of the copartners making such transfer, to follow the goods into the hands of the transferees, and require them to account for such goods, or the proceeds of the sale thereof, and apply the same in satisfaction of their judgments.
- [5.] A defendant, in his answer to a bill in Chancery, cannot charge himself with the receipt of goods, or the proceeds of the same, and also *discharge* himself, by alleging that he has accounted therefor.

In Equity, in Crawford Superior Court. Tried before Judge STARK, August Term, 1850.

This was a creditor's bill, filed by the plaintiffs in error, against the defendant in error, to subject certain assets to the payment of the judgment creditors of the firm of E. W. & J. Dennis.

The bill alleges that in February, 1841, E. W. & J. Dennis, who had been doing business as merchants and partners for a

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number of years previous, made a pretended transfer of the goods then on hand, a part of which were on the shelves of the store-house and a part in boxes, unopened, therein, of the value of \$2700, to the firm of James J. Ray & Co. the said firm being composed of James J. Ray, E. W. & J. Dennis.

The bill alleges that the change of name of the firm, was merely for the purpose of winding up the business of the old firm, and that no interest in the stock of goods was transferred to James J. Ray—that he contributed no part of the partnership stock of James J. Ray & Co.—that it was verbally agreed by the parties, that Ray should, as a compensation for his services, receive one-third part of the profits of the concern, and be liable for one-third part of its losses.

The bill alleges that all the goods afterwards purchased for the firm of J. J. Ray & Co. were purchased in the name and on the credit of E. W. & J. Dennis; that the said firm was dissolved in the year 1844. Among other debts alleged to have been owing by the firm of E. W. & J. Dennis, was one to the Central Bank of Georgia, which it was alleged had been paid off by the indorsers, Crutchfield and Gregory J. Turner. In July, 1844, E. W. Dennis departed this life intestate and insolvent. At August Term of the Superior Court of Crawford County, 1844, James J. Ray was appointed receiver of the assets of the firm of James J. Ray & Co.—that as such receiver, he received into his hands a large sum, consisting of notes, accounts, &c. which was the property of E. W. & J. Dennis, and that the same was the proceeds of the stock of goods on hand at the time of the change of the partnership name, in 1841, and that there was no outstanding debts against the firm of James J. Ray & Co.

The bill charges that the said James J. Ray refuses and neglects to pay out the assets received by him, to the judgment creditors of the firm of E. W. & J. Dennis.

The bill prays that the said James J. Ray may account for the assets which went into his hands as receiver, and that the same may be applied to the payment of the creditors of the firm of E. W. & J. Dennis.

In his answer, among other statements which it is not neces-

sary to give, the defendant states : " That the firm of James J. Ray & Co. bought of the firm of E. W. & J. Dennis, the stock of goods on hand in 1841, and then on the shelves of the said E. W. & J. Dennis ; that the said stock consisted of a small remnant of old goods of little value, to wit : of the value of \$1100, which the said firm of James J. Ray & Co. were to take and sell at such prices as could be obtained for them, and were to account for them to said firm of E. W. & J. Dennis, for the amount produced from said sales, which this defendant says has been done.

That the only outstanding debt to which the assets in his hands are liable, is a debt due to Samuel J. Ray & Co. of the City of Macon, in an open account, for the sum of \$2175 and 9 cents ; which account, according to the understanding between the parties, is in the name of E. W. & J. Dennis, for goods sold and money advanced by said firm of Samuel J. Ray & Co. to the firm of James J. Ray & Co."

On the trial, a *fi. fa.* in favor of the Central Bank of Georgia against E. W. Dennis, as principal, and Crutchfield and Gregory J. Turner, as indorsers, was offered in evidence by the complainant. The defendant objected, and the Court rejected the *fi. fa.* on the ground of variance between the allegation in the bill and the evidence ; and the complainant excepted.

The complainant proposed to read the answer of E. W. Dennis, to a bill filed by Samuel J. Ray & Co. against James J. Ray & Co. and which answer contained admissions against the interest of the firm of James J. Ray & Co. The answer had never been filed in Court. Counsel for defendant objected to its being read, and the Court sustained the objection, and complainant excepted. Complainant then offered the answer in evidence, as an admission in writing, first proposing to prove its execution ; defendant objected, and the Court sustained the objection, and complainant excepted.

The evidence being closed on both sides, Solicitor for the complainant requested the Court to instruct the Jury, that they could not by their verdict, decree the payment of the alleged account of Samuel J. Ray & Co. out of the assets in the hands

of defendant, said account not being proved, &c. which the Court declined to charge, and complainant excepted.

Solicitor for complainant requested the Court to charge the Jury: "That if they believed from the testimony, that the assets in the hands of the defendant were the proceeds of the goods purchased on the credit of E. W. & J. Dennis, that the purchase of the goods by and on the credit of E. W. & J. Dennis, vested the property in the goods in E. W. & J. Dennis, and the assets were subject to the complainant's *fi. fas. &c.*" which the Court refused, and charged the Jury on this point: "That the purchase of the goods in the name and on the credit of E. W. & J. Dennis, did not make them the property of E. W. & J. Dennis; that it was competent for James J. Ray & Co. to have agreed with the vendors of the goods, to sell them on the credit of E. W. & J. Dennis, and look to James J. Ray & Co. for payment, and in that event, the goods were the property of James J. Ray & Co." complainant excepted.

Solicitor for complainant requested the Court to charge the Jury, that it was incumbent on the defendant, if such agreement existed, to prove it, which the Court refused to do, and complainant excepted.

The Court charged the Jury: "That E. W. Dennis could not deal with himself in selling the stock of goods to himself and Ray, but he could, by the assent of John Dennis, take Ray in as a partner with himself, and if he, with the assent of John Dennis, took Ray in as a partner, and by John Dennis' assent agreed with Ray that the stock of goods then on hand should constitute a part of the stock of James J. Ray & Co. then if the arrangement was not intended to defeat defendant's creditors, the transfer is good in law, and the goods become the property of James J. Ray & Co. and all the assets of the firm of James J. Ray & Co. are sacred to the payment of Samuel J. Ray & Co. in preference to the complainants' claims."

To which charge complainant excepted, and upon these several exceptions has assigned error.

G. R. HUNTER, for plaintiff in error.

POE & NISBET, and HALL & HALL, for defendant.

By the Court—WARNER, J. delivering the opinion.

[1.] The first alleged ground of error which we shall notice, is the rejection of the Central Bank *fi. fa.* offered in evidence by the complainants. The allegation in the complainant's bill is, that there was a debt due from *the firm of E. W. & J. Dennis* to the Central Bank, which had been paid off by Thomas Crutchfield, and Gregory J. Turner, as indorsers.

The *fi. fa.* offered in evidence, was not against the firm of E. W. & J. Dennis, but issued on a judgment, as appears upon its face, against E. W. Dennis as *principal*, and John Dennis, Thos. Crutchfield and Gregory J. Turner, as *indorsers*. The complainants did not move to *amend* the bill, so as to make the allegation and the evidence correspond, and we think the evidence was properly rejected by the Court, on the ground of *misdescription* of the *fi. fa.*

[2.] The second ground of error taken is, the rejection of the sworn answer of E. W. Dennis to a bill in Equity, filed against the copartnership firm of James J. Ray & Co. of which E. W. Dennis was a member. This answer had not been filed in the cause as an answer, at the time it was offered, and the Court declined to stop the progress of the cause then before it, to take up another for the purpose of having the answer filed. As a matter of practice, we see no objection to the ruling of the Court on this point, and shall not undertake to control its discretion, in refusing to take up another cause for the purpose of permitting the answer to be filed, as E. W. Dennis had departed this life, and there were objections to the paper being filed as his answer.

[3.] The third ground of error assigned is, the rejection by the Court, of the paper purporting to be the answer of E. W. Dennis, as one of the copartners of James J. Ray & Co. containing *admissions in writing*, against the interest of said company—first offering to prove the signature of Dennis thereto. This evidence, as an admission in writing, made by one partner against the interest of the copartnership, which is admitted to have existed at

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the time it was made, ought, in our judgment, to have been received. The admission was not offered to establish a *copartnership*, so far as James J. Ray & E. W. Dennis were concerned; that fact was not disputed; but was offered as an *admission* of one of the copartners, adverse to the interest of the copartnership, and favorable to the complainants, who are now seeking to collect their debts out of the assets, which they allege went into the hands of James J. Ray & Co. See 1 *Greenleaf Ev.* §177.

[4.] The fourth ground of error is to the charge of the Court to the Jury.

The Court charged the Jury: "That the purchase of the goods in the name and on the credit of E. W. & J. Dennis, did not make them the property of E. W. & J. Dennis; that it was competent for James J. Ray & Co. to have agreed with the vendors of the goods, to sell them on the credit of E. W. & J. Dennis, and look to James J. Ray & Co. for payment, and in that event, the goods were the property of James J. Ray & Co."

Solicitor for complainants then requested the Court to charge the Jury, that it was incumbent on the defendant, if such *agreement* existed, to prove it; which the Court refused to do.

The object of the complainants is, to reach the proceeds of the goods which had been purchased by E. W. & J. Dennis, on their credit, *prior* to the formation of the partnership of James J. Ray & Co. in February, 1841. The complainants charge, that the goods on the shelves of the storehouse, and in the boxes therein, purchased by E. W. & J. Dennis, were turned over to the new firm of James J. Ray & Co. and that the latter firm paid nothing therefor, and that the defendant, as the receiver and assignee of James J. Ray & Co. has now in his hands the proceeds of the goods so purchased by E. W. & J. Dennis, and so turned over to the new firm of James J. Ray & Co. The question on the trial was, whether the goods on the shelves, and in the boxes in the storehouse, at the time of the formation of the new partnership, were the property of E. W. & J. Dennis, and turned over to the new firm of James J. Ray & Co. without any consideration having been paid therefor, by the latter firm? If the

goods on the shelves, and in the boxes in the storehouse, were the property of E. W. & J. Dennis, purchased in their name, and upon their credit, and were turned over to this new firm of Jas. J. Ray & Co., without the latter firm having *bona fide* purchased and paid a valuable consideration therefor, or without having paid any thing therefor, as is alleged, to the former firm of E. W. & J. Dennis, then, the goods, or the proceeds thereof, still remain the property of E. W. & J. Dennis, and may be followed and made subject to the payment of their creditors' debts. The goods were purchased in the name, and on the credit of E. W. & J. Dennis, and were in their possession in February, 1841, when turned over to the new firm of James J. Ray & Co. But the Court instructs the Jury: "That it was competent for James J. Ray & Co. to have *agreed* with the vendors of the goods to sell them on the credit of E. W. & J. Dennis, and look to James J. Ray & Co. for payment, and in that event, the goods were the property of James J. Ray & Co." Concede that it would have been competent to have made such an *agreement*, yet, we are entirely unable, after the most diligent search, to find the least evidence of any such agreement in this record. It would have been very remarkable, had such an agreement been proved in relation to the goods, now the subject matter of controversy; for it will be recollected, that the goods had been purchased by E. W. & J. Dennis, and were then in their possession in the storehouse, on the shelves, and in boxes, *at the time* the copartnership of James J. Ray & Co. was formed. Upon this point, the answer of the defendant is quite *significant* and *contradictory*. "This defendant further answering, says: That the firm of James J. Ray & Co. *bought* of the firm of E. W. & J. Dennis, the stock of goods on hand, and then on the shelves of the said E. W. & J. Dennis, of the value of eleven hundred and twenty dollars, two and a half cents, as estimated by the said E. W. & J. Dennis, which the said firm of James J. Ray & Co. was to take, and *sell at such prices as could be obtained for them, and were to account to them, the said firm of E. W. & J. Dennis, for the amount produced from said sales*, which this defendant says has been done." If the firm of James J. Ray & Co. *bought* the goods of E. W. & J. Dennis,

what *price* did they agree to pay for them? If they *bought* the goods, how does it happen, that the new firm of James J. Ray & Co. was to take the goods and sell them "at such prices as could be obtained for them, and *account to E. W. & J. Dennis, for the amount produced from such sales?*" The idea of a *purchase* of the goods by James J. Ray & Co. and then to *account for the sales thereof* to E. W. & J. Dennis, is totally inconsistent with the ordinary transactions of mankind. Purchasers do not usually pay the *purchase money* for goods to the *vendors*, and then account to *them* for the *proceeds* of the sale of such goods. "This defendant says, that the stock of goods then in boxes and unopened, constitute that portion of the stock which the said Ephraim W. Dennis was to bring into the firm of James J. Ray & Co. and that the same had been purchased in the name of E. W. & J. Dennis, and that notes in the name of the said firm of E. W. & J. Dennis, had been given for the same." The defendant also states in his answer, that the said E. W. & J. Dennis agreed, for sufficient consideration, (to wit :) selling off the said above mentioned remnant of goods, and other services rendered by the said firm of James J. Ray & Co. to permit the said last mentioned firm, to use their name in the purchase of goods in New York and elsewhere, and to draw notes and make accounts in the name of said firm of E. W. & J. Dennis, for such purchases. The *agreement* here stated by defendant, must necessarily relate to such purchases of goods as were to be made *subsequently* to the formation of the partnership of James J. Ray & Co. and not to goods which had been purchased *before* that time, in the name of, and on the credit of E. W. & J. Dennis. The complainants are seeking to reach the proceeds of goods purchased by E. W. & J. Dennis, *before* the formation of the partnership of James J. Ray & Co. As to any goods which were purchased by E. W. & J. Dennis *before* the formation of the partnership of James J. Ray & Co. there is no evidence in the record of any agreement whatever, between the *latter firm* and the *vendors* of such goods, to sell them on the credit of E. W. & J. Dennis, and to look to James J. Ray & Co. for payment; and indeed, there could not have been any such agreement, for the simple reason that the

copartnership of James J. Ray & Co. had no existence at the time the goods were purchased, which the complainants seek to subject to the payment of their debts. The complainants are seeking to subject the goods which were on the shelves and in the boxes, in the storehouse, which had been purchased in the name of, and on the credit of E. W. & J. Dennis, *before* the copartnership of James J. Ray & Co. was formed, and which it is alleged, were turned over to the latter firm and been by them sold. Consequently, there is no evidence of any agreement, as to *those goods*, as stated by the Court in its charge to the Jury. In *Paschal vs. Davis*, (3 Kelly, 256,) we held, that it was error for the Court to charge the Jury, on an *assumed* state of facts, and this case is equally as strong as that. The request of the complainants solicitor, for the Court to charge the Jury, "that it was incumbent on the defendant, if such an agreement existed, to *prove* it," was both pertinent and proper, in our judgment, and ought not to have been refused.

In view of the facts of this case, as made by the record, and the principles of law applicable thereto, we think the Court erred in that part of its charge to the Jury, in relation to all the assets of the firm of James J. Ray & Co. being *sacred* to the payment of the debt of Samuel J. Ray & Co. in preference to the demands of the complainants. We do not dispute the proposition assumed by the counsel for defendant in error, that the transfer of the partnership effects of E. W. & J. Dennis, to James J. Ray & Co. for *value, and bona fide*, would have been legal and valid, and that the creditors of the former firm could not follow them; but the very question here is, whether there was any *bona fide* transfer of the goods of the old firm to the new one; or whether the latter firm ever did pay any value whatever, to E. W. & J. Dennis for the goods which were on the shelves and in the boxes?

Taking the evidence, as disclosed by this record, and we have no hesitation in saying, the firm of James J. Ray & Co. never have accounted to the firm of E. W. & J. Dennis for these goods. Where is the evidence of it? The defendant in his answer admits, that the goods on the shelves went into the hands of James

J. Ray & Co. and also the goods in the boxes ; the latter were put in, as E. W. Dennis' share of the stock ; but still the goods were the *property* of E. W. & J. Dennis, they having, as the defendant states, given their notes for them. When and how did the firm of James J. Ray & Co. pay E. W. & J. Dennis for these goods ? That is the question which it is incumbent on the defendant to answer, and one, which he has *not answered*.

[5.] In relation ~~to~~ the goods on the shelves he says, the firm of James J. Ray & Co. were to account to E. W. & J. Dennis for the *proceeds* of the sale of them, which he, "*this defendant, says he has done.*" How accounted for them ? To whom has he accounted for them ? In *Moore vs. Ferrell*, we held, that a defendant in his *answer* could not, both *charge* and *discharge* himself. 1 *Kelly*, 7. Here the defendant admits the receipt of the goods by James J. Ray Co. or so much as was on the shelves in the storehouse, but says he has *accounted* for the same. To make this part of his answer available in his defence, it is indispensably necessary he should prove by competent evidence, how, and in what manner he has accounted, and to whom. But what has become of the goods that were in the boxes, which had been purchased in the name of E. W. & J. Dennis, for which their notes were given, and which went into the hands of James J. Ray & Co. as E. W. Dennis' portion of the stock ? All the goods, both those on the shelves, and those in the boxes, were the property of E. W. & J. Dennis, in February, 1841, when this new copartnership was formed. What *consideration* have they ever received for them ?

The defendant claims the funds in his hands for the payment of a debt contracted by James J. Ray & Co. with Samuel J. Ray & Co. If the defendant has in his hands as the receiver and assignee of James J. Ray & Co. the proceeds of the goods sold by them belonging to E. W. & J. Dennis, their creditors have an equitable right to have the same applied to the satisfaction of their judgments, in preference to a creditor of James J. Ray & Co. The property of E. W. & J. Dennis cannot be appropriated to the payment of the debts of the creditors of James J. Ray & Co. Let James J. Ray & Co. pay their creditors with their

own property ; certainly the property of E. W. & J. Dennis is not *sacred* for the payment of the debt of Samuel J. Ray & Co. who are creditors of James-J. Ray & Co. in preference to their own creditors, who most probably sold them the identical goods, the proceeds of which are now sought to be applied by the defendant, to the payment of debts contracted by James J. Ray & Co. The complainants' debts were contracted *before* the co-partnership of James J. Ray & Co. was ~~formed~~, or are the *renewal* of debts contracted before that time. It is a mistake to suppose that the complainants seek to make the new firm of James J. Ray & Co. bound for the debts of the old firm of E. W. & J. Dennis. What the complainants seek is, to reach the goods of their debtors, or the *proceeds* thereof, which went into the hands of James J. Ray & Co. and to have the same applied in satisfaction of their judgments, on the principle, that the property of E. W. & J. Dennis, is subject to pay their debts, in whomsoever hands it may be, and a Court of Equity will lend its aid to reach it, whenever the remedy at Law is inadequate. However, the *jurisdiction* of the Court was not questioned on the argument, and it is not necessary now to discuss it. Now, it may be true, that all the assets in the hands of the defendant, *belonging to the firm of James J. Ray & Co.* may be *sacred* to the payment of the debt of Samuel J. Ray & Co. one of the creditors of that firm ; but does it follow, that that portion of the assets in the hands of the defendant, as the assignee of James J. Ray & Co. arising from the sale of E. W. & J. Dennis' property, is the property of James J. Ray & Co. and *sacred* to the payment of the debts of the latter firm ? The error of the Court consists, in not *discriminating* in its charge to the Jury, between the assets in the hands of the defendant, which were legitimately the property of James J. Ray & Co. and such as were the property of E. W. & J. Dennis. The Court should have instructed the Jury in relation to this branch of the case, that if the assets in the hands of the defendant were the *proceeds* of the sale of the goods which were turned over by E. W. & J. Dennis to James J. Ray & Co. for which the latter firm *had not accounted*, then, the complainants, as their judgment creditors, were entitled to have an ac-

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count thereof, and to have the same first applied to the payment of their demands, in preference to the creditors of James J. Ray & Co. for the obvious reason, that the assets in the hands of the defendant, arising from the sale of E. W. & J. Dennis' property, for which James J. Ray & Co. had *never accounted*, did not belong either, to James J. Ray & Co. nor to their creditors. The complainants do not seek to interfere with the assets which properly belong to James J. Ray & Co. in the hands of the defendant. The complainants are seeking to reach the assets in the hands of the defendant, which belong to E. W. & J. Dennis. It is our judgment then, from a careful inspection of this voluminous record, that according to the pleadings and evidence, as contained therein, that so much of the goods as were purchased in the name of, and on the credit of E. W. & J. Dennis, prior to the formation of the partnership of James J. Ray & Co. and turned over to the latter company, including the goods which were on the shelves of the storehouse and in the boxes therein, are subject to the payment of the complainant's demands, as well as the proceeds arising from the sale thereof; and that the complainants, as the judgment creditors of E. W. & J. Dennis, are equitably entitled to have an account of said goods, as well as the proceeds of the sale thereof, from the defendant, as the receiver and assignee of James J. Ray & Co. and to have the same first applied to the payment of their judgments, in preference to any debts contracted by James J. Ray & Co. Let the judgment of the Court below be reversed.

MACON, FEBRUARY TERM, 1851.

Harper vs. Smith.

No. 81.—JAMES M. HARPER, administrator, &c. plaintiff in error, vs. LEMUEL SMITH, defendant in error.

[1.] An administrator with the will annexed, has no authority to administer upon any portion of the estate of the testator, not disposed of by the will.

Ejectment, in Crawford Superior Court. Tried before Judge STARK, August Term, 1850.

This was an action of ejectment, instituted by the plaintiff in error, as the administrator, with the will annexed, of Samuel Harper, Sen. against the defendant in error, for the recovery of a lot of land in Crawford County.

The defendant pleaded the general issue and the Statute of Limitations.

On the trial it appeared in evidence, that the land was drawn by Samuel Harper, in 1821, and that in 1828 the same was sold by the (then) Sheriff of Crawford County, under executions against the said Samuel Harper, when the defendant in error became the purchaser, and went forthwith into possession. Samuel Harper departed this life in January, February or March, 1828; and the plaintiff in error sought to show that the judgments upon which the *fi. fas.* were issued, under which the land was sold, were rendered subsequent to the death of Samuel Harper. In relation to this point, however, the evidence was not clear.

The will of Samuel Harper, Sen. attested by only two witnesses, was given in evidence; also the letters of administration, with the will annexed, which had been granted by the Court of Ordinary of Crawford County to the plaintiff.

The Court in substance charged the Jury, that if the judgments against Samuel Harper, Sen. were entered up after his death, or had been paid off before the sale of the land by his widow, (having been rendered before the death of Samuel Harper, Sen.) and Smith, the defendant, *was cognizant of these facts*; that then his title was defective; otherwise, he was not to be affected by these irregularities.

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The Court also charged the Jury, that the will of plaintiff's testator, being attested by only two witnesses, does not dispose of the land, and that the plaintiff, as administrator with the will annexed, has no right to recover in this action.

The Court farther charged the Jury, that if they believed from the evidence, that the defendant had been in the peaceful and notorious adverse possession of the land, claiming to be owner for seven years next preceding the commencement of this action, (the heirs of Samuel Harper not having been minors, or his widow a married woman during the time,) the plaintiff's right to recover was barred by the Statute of Limitations, and they should find for the defendant.

To which charges of the Court, counsel for plaintiff excepted, and has assigned error.

G. R. HUNTER, for plaintiff in error.

POE & NISBET and HALL & HALL, for defendant.

By the Court.—NISBET, J. delivering the opinion.

... if the plaintiff is not the administrator upon the estate ... will of the testator, he cannot maintain ... he is not. As, then, the suit ... necessary to

brought ejectment for lands which he claims to belong to the estate of the decedent, and insists upon his right to sue by virtue of the grant of letters to him as above stated. It is held by the plaintiff in error, that being appointed by the Ordinary, administrator, with the will annexed, he is thereby administrator upon the undevise^d real estate of the testator; whereas the defendant holds, that this appointment only authorized him to execute the will of the testator as to the *personalty*, and that a distinct grant of administration upon the *realty* could alone authorize him to administer upon that. As before stated, our judgment is with the defendant in error.

It is scarcely questionable, that letters of administration, generally, and with the will annexed, may be granted to the same person, since, by our Statute, he who is entitled to the administration in the one case, is entitled in the other, to wit: the next of kin. *Prince, 227.*

This could not be done, however, upon application for letters with the will annexed alone. Notice for letters general upon the undevise^d portion of the estate, ought to be given, as in any other case of intestacy. Two points, then, seem to be made in this case. First, did the Court of Ordinary *intend* to grant letters to the plaintiff, upon the estate of the deceased, undevise^d, to wit: the land? Second, if there is no evidence of such intention, is it legally true, that where letters are granted with the will annexed, the grantee is thereby also clothed with the powers of a general administrator? It is not apparent, from the record of the action of the Ordinary, that they intended to do more than to appoint the plaintiff administrator with the will. It will not answer to *infer* a general grant. An administrator who is limited by the legal character of his trust, cannot be clothed with general powers, by implication. To make him a general, as well as a special representative of the estate, he must be clearly and expressly appointed to both trusts. They are, as we shall see, altogether different. The inference as to the mind of the Ordinary is, that when they appointed him to administer the estate according to the will, they did not intend to appoint him to administer other portions of the estate according to the gene-

ral law regulating the settlement and distribution of intestate's estates. No inference as to such intention can be drawn from the character of the limited administration, but the contrary, for where an agency of any kind is special, that fact excludes the idea of its being at the same time general. The order recites the application to have been for letters, with the will annexed; that there was no objection made, and that the will exhibited no appointment of an executor; that no letters testamentary or of administration had been granted on the estate of the testator, and that the plaintiff had taken the oath, and given the bond required of him. Then follows the judgment of the Court, in these words—"On motion, ordered by the Court, that letters of administration on the estate of the said Samuel Harper, Sen. deceased, do issue to the said James M. Harper, and that this order be entered upon the minutes of the Court." The argument in favor of an intention to grant general letters, is drawn from the generality of the words used in the judgment, to wit: "*letters of administration on the estate* of the said Samuel Harper, Sen. deceased." It is said that these words convey a general grant. So they do, standing alone; but they cannot stand alone. They are to be construed in the light of the recitals—they are to be limited in their meaning by the facts and circumstances of the case. They refer to the fact, that the letters which they award, were asked for with the will annexed—to the fact that there was a will, and that it was imperfect, no executor being appointed. The whole case, as it stood before the Court of Ordinary, is to be regarded in construing the order. Thus regarded, it is palpably plain that the intention was to grant letters with the will annexed, and no more. It is unreasonable to suppose that the Court volunteered to give him anything more than what he asked. I hold, that in no case can the Court of Ordinary grant letters upon an intestate's estate, until all parties in interest are warned by notice. Here, there is no notice of an application for general letters. The notice (if any was given) for special or *limited* letters, cannot, at the same time, be a notice for *general and unlimited* letters. There is good reason for the notice. The persons interested in the undivided estate, are not

necessarily the same with those interested under the will. In the one case the property goes to them by law, in the other it may go to strangers by the will. Whilst, then, they are interested in the granting of letters in the one case, they may be utterly indifferent in the other. If notice be a legal requirement, we are not to presume an intention to grant general letters without it. We are to presume, in favor of a Court having jurisdiction, that it intended to act according to law. The record then shuts the door upon the position, that this plaintiff is the administrator upon the undivided real estate which he has instituted suit to recover, as the property of Samuel Harper, Sen. deceased.

The second point, to wit: that by law the appointment of an administrator, with the will annexed, clothes him also with the powers of a general administrator, is plainly against the plaintiff. In England and here, by Statute, administration with the will annexed, is a limited administration. It is limited by the will. That is the law of the trust. The argument for the plaintiff is, that when an administrator is appointed, he is the representative of the estate, by *virtue of his being the administrator*, and that he is not the less the representative of the whole estate, because he must administer a part of it according to the will, and a part according to the general law of distribution. This is simply begging the question. It really amounts to an assumption that there is no such thing as a limited administration, which we very well know is an error. Both the general and limited administration, that is, with and without the will, are trusts created by law. The latter by the general law, and the former by the Act of 1792. *Prince*, 227. They are distinct—the powers of the trustee are different—the law of their action is different, and their fidelity is secured by different oaths, and their responsibility by a different bond. There are two, and only two contingencies upon which an administrator, with the will annexed, can be appointed. One, where the testator, leaving a will, fails to appoint an executor or administrator, (this case)—the other, where the executors refuse to qualify. *Prince*, 227. This is also the Common Law. Our Statute authorizes the appointment, if the

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executor *refuses to qualify*—the Common Law, when the appointment of executors *fails* for any cause. This is the only, if it be any difference. 1 *Williams' Exr.* 309, *et seq.* *Ib.* 145, 146, and notes.

The object of the law is, where one dies leaving an imperfect will, to secure the enforcement of that will; and the administration, with the will annexed, comes in in lieu of an executor, with his powers, and his obligations, and his limitations. The rule of the executor's action is the will—so of the administrator with the will annexed. His office differs little from that of an executor. 1 *Williams' Exrs.* 309, 310. 2 *Black. Com.* 505. Can an executor administer upon any estate not bequeathed in the will? In Massachusetts he can *by Statute*; and even under that Statute, it became a doubt whether it was not necessary for him to take out special letters to administer the estate undevise. 6 *Mass.* 151, 152. At Common Law he could not, and his powers in this regard are not enlarged by any Statute in Georgia. If he cannot, the administrator with the will annexed cannot, for his powers are those of the executor. In the case before me, the will is good as to the personalty, but void as to the realty. As to the realty, Samuel Harper died intestate. As to that, there is no will. How could an executor touch that real estate, deriving his powers from the will; and how can an administrator, deriving his powers from the will, touch it any more than the executor? As to the realty, our judgment is, that administration can be taken out only in the regular way—that is, as in any other case of intestacy. Our Legislature intended no such thing as that the administrator with the will annexed, should have general powers. This is manifest in the oath which they have prescribed—that is, an oath *well and truly to execute the will.* *Prince*, 227. If the administrator, with the will annexed, is also the general administrator, then is he so without any oath in this latter character, because the oath to execute the will is all the oath which the law requires of him. So his bond is to administer the goods and chattels of the testator, according to law, and pay and deliver all the legacies contained and specified in the will. As general administrator, he would give no bond, for the

bond as administrator, with the will annexed, is all the bond the law requires of him. The obligations of his bond cannot exceed the duties which the law devolves upon him.

Let the judgment be affirmed.

No. 82.—MATTHEW J. COX, executor, &c. plaintiff in error, vs.
ELIJAH BAILEY, defendant in error.

[1.] Where one of four joint and several promisors, promised to pay the debt *before* the Statute of Limitations had operated as a bar, it takes the case out of the Statute as to the others.

Assumpsit, in Henry Superior Court. Tried before Judge STARK, October Term, 1850.

The plaintiff in error instituted an action of assumpsit against the defendant in error, upon a promissory note, of which the following is a copy :

“ Twelve months after date, I promise to pay Edward Cox, or order, twenty-seven hundred dollars, for value received. 24th November, 1837.

MORTON BLEDSOE,
JOSEPH P. MANLY,
ELIJAH BAILEY,
WILLIAM LANDRUM.”

The defendant pleaded the Statute of Limitations.

On the trial, the plaintiff read the note in evidence, and then submitted to the Jury the testimony of Joseph H. Lumpkin and Joseph T. Lumpkin, taken by deposition, who proved the payment of \$2,000 on said note, on the 6th day of July, 1843, and \$300, on the 19th day of April, 1845.

Counsel for defendant then moved the Court for a non-suit, which motion was sustained, and a non-suit awarded upon the ground, "That payment by one joint obligor, even before the Statute of Limitations had run, did not prevent the Statute from running in favor of his co-obligor.

To which decision of the Court counsel for plaintiff excepted.

GLENN, for plaintiff in error.

McCUNE, for defendant.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question made by the record in this case is, whether part payment of a promissory note made by one of four joint and several makers, or promisors, before the Statute of Limitations had barred the debt, will operate, so as to prevent the bar of the Statute as to the others. We have already held, that part payment of a debt, is a sufficient acknowledgement that the whole debt is still due, so as to authorize the presumption of a promise to pay the remainder; but that is not the question now presented for our consideration. The question here is, whether part payment of a note by one of two or more joint and several obligors, or promisors, is a sufficient acknowledgement that the whole debt is still due, so as to authorize the presumption of a promise to pay the remainder, by the other obligors or promisors. It may be stated as a general legal proposition, that the act of one copartner, in respect to the copartnership business, will be binding on the other copartners, for the reason, that there exists a community of interest between them, in relation to that particular business. In all such cases, one partner is considered as the agent of the other partners. A partnership may be limited to one particular subject—per Lord Mansfield, *Willet vs. Chambers*, Cowpers' Rep. 816. If two persons should draw a bill of exchange, they are considered as partners in respect to the bill so drawn, though in every other respect they remain distinct, and would not be permitted to deny that fact,

when the holder of the bill seeks to enforce its payment. *Carrie vs. Vickery*, *Douglass' Rep.* 653, note. Is not the principle the same, when two or more *jointly* and *severally* engage to pay a specific sum of money, notwithstanding some of the parties may be sureties? Is there not a community of interest between the parties so contracting, *quoad* that particular contract? There is undoubtedly a *privity* of interest between the parties, although some of them may be sureties, as it is said the defendant is, in this case. In *Exall vs. Partridge*, Lord *Kenyon*, said: "Where one person is surety for another, and compellable to pay the whole debt, and he is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal." 8 *Term Rep.* 310.

So in the case cited from *Rolls' Abridgement*, in *Child vs. Morley*, (8 *Term Rep.* 614,) where a party met to *dine* at a tavern, and after dinner, all but one of them went away without paying their quota of the reckoning, and that one paid for all the rest; and it was held, that he might recover from the others their aliquot proportions. Upon what principle was the one who paid the whole bill, entitled to recover from the others? Doubtless upon the principle, that the parties had associated themselves together, for the purpose of that *particular transaction*, and were jointly and severally liable to pay for the dinner, of which they all partook, as a *special association* of individuals, who were sureties for each other; there was a *privity* of interest between them in respect to that *special* undertaking, and the payment made by one, of the whole bill, was made for the benefit of *all the others*. Here the defendant, with three others, jointly and severally promised to pay the sum of money specified in the note. In respect to this contract, they were *jointly* interested, and the holder of the note had the right to consider them as joint and several contractors, so far as its payment is concerned, as if they had been partners. There being a community of interest between them, in respect to this *particular contract*, the promise of one to pay it before the Statute bar had attached, must be considered as the promise of all; upon the principle, that each joint contractor, with respect

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to the *joint contract*, is to be considered as the *agent* of the others. The payment made by one, from which the promise is to be inferred, accrued to the benefit of all the other joint contractors. Can the other joint promisors derive a *benefit* from the payment made by one, and *repudiate* the act, when the legal consequences which result from such payment operate against them? Upon what legal principle can the defendant receive *the benefit of the payment* made by one of his joint promisors, and not be bound by all the legal consequences which result from *that payment*? The defendant in effect says, that his copromisor was his *agent* to make the payment on the note, and extinguish *his* liability to that extent; but when that act of his agent in making the payment, is sought to be made to operate against him by preventing the bar of the Statute of Limitations, then it is, he *repudiates his agency*.

The defendant in error cited on the argument, *Bell vs. Morrison*, 1 Peters. *Levy vs. Cadet* 17, *Sergeant & Rawle*. *Bank of Exeter vs. Sullivan, et al.* 6 New Hampshire Rep. In *Bell vs. Morrison* and *Levy vs. Cadet*, the promise was made *after the dissolution*, of the copartnership. *The Bank of Exeter vs. Sullivan*, covers the point made by the plaintiff in error. In that case, as here, the promise was made before the Statute had operated as a bar, but the great weight of authority, both in England and in the United States, is in opposition to the judgment of the Court in the *Bank of Exeter vs. Sullivan*. In *Whitecomb vs. Whiting*, (2 Douglass, 652) Lord Mansfield held, that the payment by one, is payment for all; the one acting virtually as *agent* for the rest. In *Parham vs. Raynal* (2 Bingham, 306,) Ch. Justice Best, elaborately considered the question, and sustained the judgment in *Whitecomb vs. Whiting*, holding that case to rest on the same principle, as decisions with respect to admissions by one of several persons *jointly* concerned, in other instances; that an *anomaly* would be created by departing from it; that it had been confirmed in many cases, and *not shaken by any authority*. See also *Wyatt & Hodson*, 8 Bingham, 309. *Pease vs. Hirst*, 10 Barn. & Cress. 122. *Burleigh vs. Stott*, 3 Barn. & Cress. 36. *Smith vs. Ludlow*, 6 John. Rep. 267. *Johnson vs. Beardstie*, 15 John.

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Rep. 3. Beitz vs. Fuller, 1 McCord's Rep. 541. White vs. Hale, 3 Pick. Rep. 291. Sigourney vs. Drury, 14 Pick. Rep. 387. Dinsmore vs. Dinsmore, 8 Ship. Rep. 433. Shelton vs. Cocke, 3 Munf. Rep. 191. Walton vs. Robinson, 5 Iredell's N. C. Rep. 341. Brewster vs. Hardeman, Dudley's Rep. 150. The promise having been made by one of the joint and several promisors, *before* the Statute had operated as a bar, we are of the opinion, both upon principle and authority, that it took the case out of the Statute as to the other joint and several promisors; therefore, let the judgment of the Court below be reversed.

No. 83.—PHILIP FITZGERALD, plaintiff in error, vs. SANDFORD ADAMS and BENNET YOUNGBLOOD, defendants.

- [1.] The rule requiring the production of the best evidence of which the nature of the case is susceptible, is essential to the true administration of justice.
- [2.] The cases which most frequently call for the application of this rule, are those which relate to the substitution of *oral* for *written* evidence.
- [3.] In all cases where the law requires that the evidence of the transaction should be in writing, no other proof can be substituted, as long as the writing exists, and is in the power of the party.
- [4.] The jurisdiction given to Justices' Courts, is to hear and determine suits by *summons* or *warrant*; and a copy of the process is to be served by the Constable personally on the defendant, or left at his usual and notorious place of abode.
- [5.] It is the duty of the Constable to make an entry of service on the *summons* or *warrant*, in writing, and sign such return.
- [6.] These original documents will be presumed to be preserved and of file in the proper repository for the official papers of the Militia District, until the contrary appears, and no secondary evidence can be allowed, until diligent search has been made for this primary proof.

Certiorari, in Fayette Superior Court. Decided by Judge HILL, September Term, 1850.

Fitzgerald vs. Adams and Youngblood.

Philip Fitzgerald obtained nine judgments against the defendants in error, in a Justice's Court in Fayette County, at the April Term, 1842. On the 13th of the same month, *fi. fas.* were issued thereon, which were, in March, 1849, levied on the property of Adams, who filed his affidavits of illegality to said *fi. fas.* on the grounds—

1st. Because he never was summoned to appear and defend said suits, nor had any notice that the same were pending.

2d. Because no original summons were ever issued, nor copies served on him, nor service acknowledged, nor judgment confessed, neither by himself, nor any other person authorized to do so for him.

At the August Term, 1849, of the Justice's Court, a trial was had upon the said affidavits of illegality, when the defendant proposed to prove by Archibald McEachern, that he (witness) was the only Constable acting in the district the year in which the judgments were obtained, and that he did not serve the defendants with any summons in the cases.

To which the plaintiff objected, on the ground that the evidence sought to be submitted was secondary in its character and was inadmissible, until it was shown that the original summons, with the return of the Constable thereon, were lost or were never issued, and, also, because parol evidence was inadmissible to set aside a judgment, and if there was any irregularity, advantage should have been taken of the same at an earlier day. Which objections were overruled by the Court, and the evidence allowed to go to the Jury. The Jury returned a verdict sustaining the affidavits of illegality.

From the decision of the Justices and the verdict of the Jury, a *certiorari* was taken to the Superior Court, upon the hearing of which, Judge *Hill* sustained the decision of the Justices and the Jury, and dismissed the *certiorari*, and counsel for plaintiff excepted.

TIPWELL and FULLER, for plaintiff in error.

CONNER and STONE, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

At the April Term, 1842, of the Justice's Court in and for the 549th Militia District of this State, Philip Fitzgerald recovered nine judgments against Bennet Youngblood and Sandford Adams. On the 30th day of the same month, executions were issued upon these judgments by John Lunmas, a Magistrate of the District. On the 31st day of March, 1849, these *fi. fas.* were levied, by the Constable, on the property of Adams, one of the defendants, who made oath, that the same were proceeding illegally against him, upon the ground that he was never summoned to appear and defend said suits, nor had he any notice of the pendency thereof; that no warrants were ever issued or copies served in the cases, or service acknowledged, or judgments confessed, either by himself or any other person duly authorized by him for this purpose.

On the trial of the illegality, Archibald McEachern was introduced, who testified that he was Constable of the 549th District in 1842, and that he had no recollection of serving Adams with copies of the summonses in these cases; that there were frequently two Constables acting in the district at the same time, but his impression was, that there was but one in 1842.

To this testimony the plaintiff objected, as secondary and inferior—no search having been made for the original papers in the cases; but the objection was overruled, and a verdict rendered for defendant.

A *certiorari* was applied for and obtained, but dismissed upon the hearing, and the decision of the Justice's Court, setting aside the *fi. fas.* sustained. Was the parol proof admissible on the original trial?

[1.] The law requires the production of the best evidence of which the case, in its nature, is susceptible, for the obvious reason, that if this is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that if offered, his design would be frustrated. The rule, say the text books, thus becomes essential to the true administration of justice.

[2.] The cases which most frequently call for the application of this rule, are those which relate to the substitution of oral for written evidence; and these Mr. *Greenleaf* arranges into three classes—including in the first, those instruments which the law requires should be in writing, such as records, public documents, &c.

[3.] In all such cases, the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, as long as the writing exists, and is in the power of the party.

Thus, where oaths are required to be taken in open Court, where a record of the oath is made, or before a particular officer whose duty it is to certify it, or where an appointment to an additional office is required to be made and certified on the back of the party's former commission, the written evidence must be produced. *Treatise on Evidence*, vol. 1, §§82, 85, 86.

[4.] By an amendatory Act to the Judiciary, passed in 1811, (*Prince*, 501,) Justices of the Peace are empowered to hear and determine all suits, on any liquidated demand or account not exceeding thirty dollars, by *summons* or *warrant*, a copy of which it is made the duty of the Constable to serve personally on the defendant, or leave at his usual and notorious place of abode.

[5.] And the Statute expressly declares, that "It shall be the duty of the Constable serving the summons or warrant, to *make an entry of service thereon, in writing, and sign such return.* *Prince*, 502.

[6.] Here, then, is an Act, to wit: the service of these summonses or warrants, which the law requires to be in writing; and the rule, therefore, is imperative, that no secondary proof can be substituted until it is ascertained by the proper search, that these original documents do not exist, or are not in the power of the party. Until the contrary is shown, we are bound to presume that these documents have been preserved, and are of file in the proper repository for the official papers of this Militia District; and until a suitable effort is made to elicit the truth from these primary and original sources of information, it would be dangerous, in the extreme, to permit the solemn judgments of a Court

of competent jurisdiction to be set aside by the vague and uncertain recollection of the Constable.

We are all of the opinion, that the judgment must be reversed, and the *certiorari* sustained.

No. 84.—The JUSTICES OF THE INFERIOR COURT OF PIKE COUNTY, plaintiffs in error, vs. THE GRIFFIN & WEST POINT PLANK ROAD Co. defendants.

- [1.] Grants from the Legislature to a company, in derogation of common right, are to be strictly construed.
- [2.] A Plankroad Company under authority from the Legislature, to construct a Plankroad between two designated points, have no right to appropriate to that purpose, the whole of a public highway, without express authority in their charter.
- [3.] Where the charter authorizes the company to locate their road upon any part of a highway, where it becomes necessary to do so: *Held*, that in such a grant, the Legislature did not intend that they should be authorized to appropriate the whole course of any highway.
- [4.] Such a grant, whilst it is to be strictly construed, is to be interpreted so as to secure to the company beneficial results. The necessity contemplated by the Legislature, is not such a necessity of using a highway, as without such use would defeat the enterprise, but a reasonable necessity. As, for example: to avoid constructing a costly bridge over an almost impassable swamp, or an inconvenient, wide departure from the proper direction of the plankroad.
- [5.] The company are to judge of the necessity in the first instance, subject to be finally controlled by the action of the Courts; and whether the necessity exists or not, is a question of fact to be determined on the production of evidence.
- [6.] In cases where such necessity exists, the company are bound by their charter to pay the damages resulting from the appropriation of the highway, to be ascertained in the manner pointed out in the charter, and any departure from the directions therein contained, or fraudulent or collusive acts on the part of the company in relation to the assessment, will vitiate the whole proceeding, and subject them to injunction.

Justices of the Inferior Court *vs.* Plankroad Company.

[7.] *Held*, that under the charter of the Griffin & West Point Plankroad Company, and under the general law, the Inferior Court of Pike County, may rightfully institute suit in Equity, to restrain them from a violation of their charter.

In Equity. Application to Judge STARK for an injunction.

The Justices of the Inferior Court of Pike County, for the use of the people thereof, applied to Judge *Stark* for an injunction against the Griffin & West Point Plankroad Company.

The bill alleges that the company had proceeded to seize and appropriate to their use, the public road, leading from the City of Griffin, to the Flat Shoals on Flint river, passing through three militia districts in the said County of Pike; that by fraud and combination with the Commissioners of Roads in the said districts, the said Company had procured the appointment of Commissioners, as provided by the terms of their charter, who had assessed, in one of the districts, no damages or compensation, and in the others, merely nominal compensation for the use of a public road as the site to be occupied by the plankroad; that the Commissioners of roads in two of the districts had, in accordance with the award of the arbitrators, proceeded to execute a fee simple title to the public road, sixty feet wide to the said Company. The bill charges that, there was no necessity for the said Company to appropriate and occupy the said public road with their plankroad; and that by so doing, they have violated the provisions of their charter, which the bill alleges, confers no such right.

The bill charges, in order to show that no such necessity exists, that Mr. Heely, the contractor, had proposed to the said company to build the road for \$300 less per mile, if they would allow it to be laid down in a site different from that of the public road.

The bill charges, that the acts and doings of the said company in appropriating the public road, &c. &c. tends to the injury of complainants, as guardians of the interests of the people of Pike County, inasmuch as if said company shall be allowed so to do, they will be compelled, in obedience to the wishes of

a large majority of the people of the County, to open a new road, along and near the site of the Flat Shoals road, thus occupied by the plankroad, and that such public road will cost the County of Pike not less than six thousand dollars.

The bill prays that the company may be temporarily enjoined from proceeding with the construction of said plankroad, on the site of the public road, until they give adequate security to complainants, to pay such damages as may be assessed against them; that they may be enjoined until their right to appropriate the public road, is judicially decided. The bill also prays a perpetual injunction against the said company taking and using the Flat Shoals road; that the deeds executed to the said company by the Commissioners of Roads for the militia districts through which said road passes, may be delivered up and cancelled; that the said company may be decreed to pay complainants such damages as by them may have been sustained, as the guardians of the pecuniary interests of Pike County.

Judge *Stark* refused to grant the injunction, whereupon solicitors for complainants excepted.

S. T. BAILEY & W. W. ARNOLD, for plaintiffs in error.

MCCUNE, for defendant in error.

By the Court.—NISBET, J. delivering the opinion.

Our duty in this case is, first to determine whether, according to the case made in the bill, the Plankroad Company in locating and laying out their road, have acted within their charter? In doing so, we are to hold the facts stated in the bill to be true. It was charged in the bill, and I believe was admitted in the argument, that they had located their road on one of the public roads of the County of Pike, through the whole extent of that road from the City of Griffin to the County line. That public road, it is charged, was laid out and constructed under the law, by the County of Pike, and at the expense of that County. It is a highway, and was at the time of locating the plankroad upon it,

used by the people at large as such, and was of great public utility. Our first inquiry is this, have this company the right to appropriate the highway to the purposes of the plankroad at all? Our second inquiry, if they have, is, to what extent have they this right? The bill does not question the power of the Legislature to grant to this company the use of the highway for their road. We are not called upon, therefore, to consider this power in the Legislature; if we were, I should not be prepared to deny it. It would seem, that the Inferior Court, acting under authority of law, has the power to discontinue, as well as to lay out and open public roads. The Legislature may do the same thing acting directly. The discontinuance of a public road, is the exercise of the same power which is exerted in granting its appropriation to another. The Legislature may revoke the easement, since it is one which appertains to the public at large, and in which no individual or corporation has a vested right. The whole people are represented in the Legislature, and the act of the Legislature is, therefore, the act of the public, to whom the easement appertains. It is the legitimate exercise of the sovereign power. *See 11 Vern. R. 198. 4 Humph. R. 315. 2 Mass. 143. 10 Johns. R. 389. 1 Caines' R. 177.* If the Legislature may grant the whole of an existing highway to a company upon which to build a plank road, it may grant a part, or it may authorize its obstruction at certain points on it. Whether the Legislature can grant away a public highway, without providing for compensation to the County at whose expense it was opened, is also a question not made in this record; for the charter to this company requires them to make compensation for so much of the public road, as it may be found necessary for them to use.

The charter authorizes the company to construct their road on the public roads. Of this we have no doubt. The act authorizes the building of a plankroad from Griffin to West Point, and provides for the right of way over the lands of individuals, and the means of assessing the damages, in case of disagreement between the proprietors and the company. In the 6th section it is declared, "That whenever it shall become necessary for said Plankroad Company to use any part of a highway for the construction

of said plankroad, the Commissioners of Roads of the militia district in which such highway is situated, or a majority of them, may agree with said company for taking and using such highway for the purposes aforesaid." It then proceeds to direct how the damages shall be assessed in case of disagreement between the company and the Commissioners of Roads, and to whom they shall be paid, and how appropriated. Here is an express recognition of the right of the company to use the highway. The 6th section, indeed, conveys to the company a grant of the easement. But to what extent? How much of the highway may they use? Clearly, not the whole. It was manifestly not the intention of the Legislature, to discontinue any public road, by substituting a plankroad. They did not intend to authorize the company to obstruct any road throughout its entire course, and deprive the public of its use.

[1.] No right can be given to a corporation by implication. A grant to an individual, or company, which is in derogation of common right, is to be strictly construed. Even where there is ambiguity in a charter as to the extent of the powers conferred, the doubt shall operate in favor of the public and against the grantee. See *ante* the case of *R. McLeod et al. Trustees, &c. vs. Henry K. Burroughs, defendant.*

[2.] Here there is no ambiguity about the question, whether they intended the company to appropriate and destroy a public road. They, beyond all shadow of doubt, did not so intend. If, as to the construction of grants ordinarily, which are in derogation of common right, nothing passes by implication—if companies in the use of special privileges, are held stringently within their charters, with accumulated strength of reason, these rules apply in this case. The easement in the highway, appertains to the public at large—in it the people of Pike have a special interest—an interest which amounts to an equitable property, springing from the price which they paid for its construction. They and the public at large enjoy the easement under a legislative grant. The revocation of this grant cannot be presumed. Nothing short of a clear and unqualified expression of the legislative will, can authorize a Court to recognize such a

grant. When I speak of the powers of this incorporation being in derogation of common right, I do not mean to say that to build a plankroad and charge toll thereon, is a common right. I know that it is not, and that it exists only by authority from the Legislature.

But I do mean to say, that a grant of the right to appropriate to the purposes of a plankroad, an existing public highway, is a restraint upon common right—a limitation of a privilege which by existing law, belongs to all the people in common, to wit: the privilege of passing upon the highways of the State in pursuit of business or of pleasure, free of charge. That clause of this charter which relates to highways is to be strictly construed. By the limitation of the use of the highway to cases of necessity, all idea of a grant of the right of using the whole highway is excluded. The Legislature say, that whenever it shall become *necessary* for the plankroad to use *any part* of a public highway, &c. They speak of a *necessity* to use not *the whole*, but *any part*. As a part is less than the whole, where the grant is limited to a part, it can not extend mathematically, or legally, to the whole.

[3.] It is manifest, farther, that the Legislature did not intend that this company should obstruct the highway, except in cases of necessity, much less occupy the whole of it; in this, that the Act does not permit it to cross any highway, but upon condition that it does not obstruct it. It grants the power, “if need be, to conduct the plankroad across any public road or highway, and across any stream or watercourse that may be across the route: *Provided*, said company shall so construct their plankroad across *all* public roads, as not to obstruct or injure the same.” *Acts of 1849–’50*, page 228. Were there, in fact, a necessity, such as I shall hereafter define, to build this plankroad upon the whole course of a highway, I should unhesitatingly hold, that the company could not use it to that extent. Because it is obviously not the intention of the Legislature, drawn from the charter, to authorize the suppression or discontinuance of a highway. It is our judgment, therefore, that the injunction ought to have been granted, upon the ground that the company have exceeded their power under their charter, in laying out their road upon one

of the public highways of the County of Pike, throughout its entire course. Whether the fact be true, as charged in the bill, that they have so laid out their road, is a question to be determined at the hearing.

[4.] The bill, however, goes farther still, and avers that there is no necessity for occupying *any part* of the highway, and that on that account the company have exceeded their powers. This allegation makes it necessary to settle, with as much precision as we can, the kind of necessity contemplated by the Legislature. The grant is, that when it *shall become necessary*, the company shall use the highway. When does it become necessary, in the sense of the word, as used in this charter? The word in its usual acceptation, in its familiar and commonly received signification and import, is as little doubtful as most words. Yet, in its use, it has more than one meaning—there are, in its common use, at least shades of variation in its meaning. Perhaps I would be justified in saying, that the word is used amongst men, to express degrees of indispensableness, as well as that which is absolutely indispensable.

Now, we are to give a reasonable interpretation to the words of *this clause*, having reference to the subject matter, and also to other provisions. The subject matter is the grant of the road privilege to the company. It is declared in the charter, that they shall have the right to construct the road between two given points, to wit: Griffin and West Point, considerably remote from each other. The inference is, that they are empowered to run this road, in the direction of the terminus from the starting point, in the route found by survey the most convenient and best adapted to the work. If in pursuing this route, it becomes necessary to use any part of a public highway, they are authorized to use it. Used as the word *necessary* is, in reference to the objects of the law, and in connection with its other provisions, such interpretation is to be given to it, as will make the grant which it conveys available to the company. It is not to be so strictly construed as to defeat beneficial results to them. We consider that the necessity contemplated by the Legislature, is not an absolute, insurmountable necessity. For example: they did not

mean that the company should use the highway only in case there was no practicable passage but upon the highway, at any one or more points, for a plankroad, between Griffin and West Point. They did not mean to confine their use of the highway, to cases where, if they did not use it, the enterprise must of necessity fail. If between Griffin and West Point, there lay a mountain barrier, practicable for a road at a single passage, and that occupied by a highway, the use of that passage would be a necessity, without which, the whole enterprise must needs fail. We do not believe that the Legislature meant that extreme necessity. We conclude that it means, what I can no otherwise designate, than by calling it a reasonable necessity. Thus if in the route of their road laid out in the direction of its terminus, it becomes necessary to appropriate a part of the highway, in order to avoid bridging at great expense, an almost impassable swamp, or embanking a deep and wide ravine, or in order to prevent a wide and inconvenient departure from the proper direction of the road, and in all other cases falling within the reason and spirit of these illustrations; the Legislature, no doubt, intended that they should use it. It designed to give to the company such reasonable accommodation in this regard, as would facilitate their enterprise, and which at the same time, would not to any great extent, obstruct the highway. And when obstructed, the compensation which they were required to make, was intended to enable the County, without expense, to open a new highway to the extent of the obstruction, and keep up the facility of communication upon it.

[5.] Of this necessity, the company must be the judge in the first instance, subject, however, to the final judgment of the Courts of Justice. They must proceed to use such parts of the highway, as under the views we have presented of necessity, they may think within the legislative grant, but at the peril of being arrested and finally controlled by the action of the Court. Whether any appropriation of it, is or is not necessary, is a question of fact, to be determined upon proofs, according to the circumstances of each case. The bill denying any necessity whatever, to use any part of the highway, and even insisting that the

plankroad could be laid out elsewhere, with equal convenience and less costs, we have no alternative but to allow the injunction for this reason also.

[6.] The complainants farther charge, that in the assessment of damages, they have not complied with their charter. This charge applies, but not with equal force, to all the districts. It is farther charged in relation to some of the districts, that the Commissioners of Roads colluded with the company, and gave the right of way on the highway, without assessment, and that thus the County was deprived of the compensation which the charter gives them, and that, in relation to others, an appeal was prevented from the award of the commissioners, by fraudulent representations and practices on the part of the company—that notice of the time and place of making the assessment, was not given according to the charter—that the commissioners were not disinterested persons, and that in no case was the return of the assessment according to the charter, in this, that the benefits and damages were not stated. If these things be so, the charter has been violated, and the complainants are entitled to an injunction, and to be heard on the facts. It is not necessary, in minute detail, to follow the allegations of this bill, as to each of these districts, separately. It suffices to say, that fraud is charged upon the company, as to all of them, either in preventing an assessment, or in preventing an appeal. The charter contemplates an assessment, only when the company and the Road Commissioners fail to agree upon the amount of the damages. It is, therefore, competent for them to agree, and if the conduct of the parties is fair, free from fraud and *bona fide*, the agreement is binding and without appeal. The charter requires that the commissioners shall be disinterested freeholders. If they are not, that fact will invalidate their action. It requires that they shall be sworn; they must be sworn. Five days' notice to the Commissioners of Roads is required to be given of the time and place of making the award. This notice must be given. The charter requires that the Commissioners shall make a return of their award in writing, specifying therein respectively, the

amount of damages and benefit, which may result from the construction of the plankroad on the highway. -

This they must do. The Legislature did not intend that this assessment should be a matter of form, or that the benefits and damages should be imaginary values, to exist only in verbal reckoning. They intended that they should be found in dollars and cents—should be respectively stated, and be maintained as a memorial, by being filed in the Clerk's office of the Superior Court; and that the public and the company should thus have the means of knowing what was the action of their agents. This requirement was intended to hold the commissioners to a strict accountability for the execution of their trust, by requiring them to record in detail, their judgment—and making it open to the inspection of all men. From the award of the commissioners an appeal lies in behalf of the company and of the Road Commissioners. This right of appeal may not be defeated, and must be held inviolate. In short, this company is bound, as well as all others, to pursue their charter. Neither we nor they can sit in judgment on the reasonableness or expediency of its requirements. They are bound to conform to the legislative will, and it is our duty to constrain them to a strict conformity. In thus plainly speaking, I am not to be understood as censuring the company. If the facts be true which the bill states, they would be fit subjects for judicial censure. Our judgment is founded on the case made in the bill. It may be true or not; we are to take it as true, for the purposes of this opinion. Nor are we to be understood as being at all unfriendly to the enterprise of this company. I speak what I know to be the opinion of each member of this Court, when I say that as citizens, we most cordially approve it, and rejoice to see that this kind of improvement is likely to obtain to a great extent in our State. And farther, that the public spirited citizens who projected it are entitled to the thanks of the State, for being among the first to move in a work which promises great good to the republic. But we need scarcely add, that it is our earnest endeavor to hold the scales of justice steady, and as Judges, to know neither men nor corporations, Kings nor Kaisers.

In the 7th section it is provided that no difference or disagreement between the company and any landholder, shall operate by injunction or otherwise, to suspend the progress of the said work, but the same shall be continued without interruption, on adequate security being given by said company to the landholders, to pay such damages as shall be assessed in manner aforesaid. This clause extends to the Commissioners of Roads as well as to landholders, by the operation of the 8th section.. If, then, in any instance of disagreement between the company and the Commissioners of Roads about the damages, the company shall give the bond required, *eo instanti* and *ipso facto*, the injunction is dissolved.

The complainants in this bill having stood by and permitted this company to construct a part of their road, without moving to enjoin them from so doing, the judgment of this Court awarding the injunction, does not extend to so much of the plankroad as was in fact built before the application for an injunction was made to the Circuit Judge.

[7.] The company having, as we hold, according to the allegations in the bill, violated their charter, the next inquiry is, can the Inferior Court of the County of Pike, institute suit by injunction to restrain them. And first, is it competent for them to sue by injunction, to restrain them from appropriating the *whole* of a public highway, for the purposes of the plankroad?

The Inferior Court have judicial functions. It is not necessary to inquire particularly what they are. They also have ministerial functions. They are the agents of the County for many purposes. They are authorized by law to lay out and open roads—to appoint commissioners of roads in the several districts of the County. They are the supervisors and managers of the property of the County—its Court-house and jail, and public bridges, for example. They impose the taxes authorized by law for County purposes—appoint the County Treasurer, who is amenable to them. Through him they keep all the funds of the County—appropriate and disburse them. These powers characterise them as agents; and for the purposes of their agency, they are collectively a corporation with limited powers. The

right of such a corporation to sue, whether they are expressly clothed with that power or not, will not be questioned. It is incidental to their agency.

The easement in a public road, is a property in equity, belonging to the County at whose expense it is constructed. It is subject to use by the public at large—hence, as I before have said, it appertains to the public. Yet this is not inconsistent with the idea of an equitable interest or property in the County. The public use may be considered as a limitation upon that property. The interest which a County has in a public highway, springs equitably out of the fact, that that County, and not the whole public, have paid the costs of construction. The right to lay out and open the road, is derived from the Inferior Court, acting under the Legislature. The easement is a legislative grant. The people of the County make the grant available by the outlay which is necessary to open the road, and so long as the grant is unrevoked, the road, that is the easement, is an interest or property in the County. The Inferior Court are the depositories of this property, as well as any other. It is their duty to protect it, as much so as to protect the Court-house, and if it is violated, they have the right, as the agents or trustees of the County, to go into a Court of Equity for redress. Secondly, have the Inferior Court the right to sue in Equity, by injunction, to constrain the company to pursue their charter in the assessment of damages? The charter, as well as the general law, settles this point. By the general law, the damages would be payable to the County Treasurer, and be subject, in his hands, to the order of the Inferior Court. They are the County agents for the receipt and disbursement of it. By law, no one else has the control of the fund when in hand, and no one else can enforce that provision of the charter which requires the company to pay it. As the fiscal agent of the County, in their character as a corporation, they are authorized to constrain the assessment, and to enforce them to make it in pursuance of the charter. But the charter itself, in so many words, makes the Inferior Court the agent of the County, to receive and apply the damages, for it directs it to be paid to them, and to be expended in improving

the highways of the district for which they have been assessed. Such an agency implies the power to compel the assessment, to prevent the company from depriving the County by fraud, or by violations of the charter, of it. The right to sue is incidental to these powers. *Pamphlet*, 1849-'50, p. 229.

Let the judgment be reversed.

No. 85.—THE COMMISSIONERS OF ROADS FOR 580TH DISTRICT, plaintiffs in error, *vs.* THE GRIFFIN & WEST POINT PLANKROAD Co. defendants in error.

- [1.] An appeal must be entered by the appellant in person, or by his attorney at law, or by an attorney in fact, duly authorized by warrant for that purpose.
- [2.] May an attorney at law, who appears on the first trial, enter an appeal without special authority? and is it his duty so to do? *Quere de hoc.*
- [3.] Some general remarks upon the subject of plankroads.

Motion to dismiss appeal. Heard and decided by Judge STARK, August Term, 1850, in Pike Superior Court.

An appeal was taken to the Superior Court of Pike County, from an award made by commissioners appointed under the provision of the charter of the "Griffin & West Point Plankroad Company," in relation to said company taking and using the public road running from Griffin to the Flat Shoals, through said district, as a site for their plankroad. The appeal was entered by Hartford Green, Allen W. Pryor and W. W. Arnold, as attorneys at law.

At the hearing, August Term, 1850, of said Court, a motion was made to dismiss the appeal, upon the following, among other grounds: because the appeal was entered by certain per-

sons, styling themselves attorneys at law, and who had not been employed until after the cases had terminated by an agreement between the parties, and then only by the *Inferior Court*.

The Court sustained the motion, and dismissed the appeal; whereupon the counsel for plaintiff excepted.

W. W. ARNOLD, GREENE, PRIOR and BAILEY, for plaintiffs in error.

McCUNE, for defendant.

By the Court.—LUMPKIN, J. delivering the opinion.

The 8th section of the Act passed by the last Legislature, to construct a plankroad from Griffin, in Pike, to West Point, in Troup County, *provides*, “That whenever it shall become *necessary* for said Plankroad Company to use any part of a public highway, for the construction of said plankroad, the Commissioners of Roads of the Militia District in which such highway is situated, or a majority of them, may agree with said company, upon the compensation and damages to be paid by said company, for taking and using such highway, for the purposes aforesaid. Such agreement shall be in writing, and shall be filed and recorded in the office of the Clerk of the Superior Court of the County through which the highway may pass; and in case such agreement cannot be made, the compensation and damages for taking such highway for such purposes, shall be ascertained in the same manner as the compensation and damages for taking the property of individuals.” *See Pamphlet Laws, 1849, 1850, p. 229.* That is, by three disinterested freeholders—one to be appointed by the Judge of the Superior Court, one by the Company, and one by the Commissioners of Roads for the District, (*see 6th section of the Act, lb. p. 228,*) with the right of appeal to either party to be tried by a Special Jury, at the next term thereafter of the Superior Court of the County. *Ib.*

The Commissioners of Roads for the 580th Militia District and the Company, not being able to agree as to the amount of compensation to be paid for so much of the public road, as was

appropriated by the company for the construction of the plank-road through that district, an assessment was made by appraisers, in terms of the Statute. One of the three Road Commissioners ratified the award—the other two protested against it in writing; and this, so far as the record discloses, is all they did to signify their disapprobation.

[1.] An appeal was entered in the name of these two commissioners, “by Green Prior and Arnold, attorneys at law,” which, at the appearance term of the Superior Court, was, upon motion, dismissed for want of authority to enter it, and it is to reverse this judgment and reinstate this appeal, that this writ of error is prosecuted.

[2.] It is not necessary to determine whether an attorney of record in an action, in which a verdict has been rendered against his client, may prosecute an appeal of his own accord, and without special instructions, and whether it is his duty so to do. 2 *Just.* 378. *Cro. Eliz.* 177. 2 *Show.* 61. 1 *Salk.* 89. 2 *Ib.* 603. 2 *Lord Raym.* 895. *Ib.* 1048. *Bacon's Abv.* volume 1, pp. 406, 409. 2 *B. & P.* 357. 2 *D. & E.* 337. 8 *Johns. Rep.* 361. 2 *Bibb,* 382. 4 *Conn. Rep.* 517.

It appears that the counsel who entered the appeal, were not employed on the trial before the appraisers, and, consequently, were not what are usually denominated attorneys of record. The presiding Judge certifies, that there was not a particle of evidence exhibited to him, to show that the appeal was entered by the approval or consent of the Commissioners of Roads, or which manifested the least intention, on their part, to prosecute the litigation farther; and that when the power for entering the appeal was called for by him, upon the argument, the only authority produced was, an order passed by the *Inferior Court* of the County, who it is admitted, had no right to control the case in this respect.

The appeal, then, having been improperly entered, for want of competent authority, we affirm the judgment of the Court below in dismissing it.

Any general observations upon the subject of plankroads, might be considered as foreign to the case. As, however, this

is the first time where this important link in the great chain of internal improvements, which is doing so much for the civilization of the age, has been before the Court, I trust it will not be thought altogether inappropriate to add a word or two upon a thoroughfare which, began in Russia, was introduced into Canada by Lord Sydenham in 1834, and established in this Union, in New York in 1846, where, in five years, they have constructed over a thousand miles, which is now completed and in daily use, and where, by the side of railroads, they are paying from 10 to 15 per cent. interest, and carrying passengers at two cents a mile; and, perhaps, I could not do better than transcribe and indorse, so far as my humble opinion will go, a few paragraphs from one of the most valuable publications of the day, touching a movement which is rapidly becoming the great medium of communication between the *producer* and the *market*:

“In the list of the great improvements which have given to this age the character which it will bear in history, above all others—the age of happiness to the people—the plankroad will bear a prominent place, and it deserves it. It changes the condition of the farmer, wherever it is found. It gives a thoroughfare second only to the railway, and in this respect superior to it, that it may be used by all, without being subjected to the rules and regulations of others as to the time, speed or equipage in which they may choose to travel.

“It annihilates one of the sorest evils known to our rural life—an evil which has hitherto made a farm in some, in many parts of our country, an involuntary hermitage, secluded and attainable only by a weary pilgrimage over—no, not *over*, but *through* roads which seemed to have concentrated all the evils that could embarrass the traveller. A bad road is no longer known where there is a plankroad. The farmer is brought in the vicinity of the village and city, exempt its benefits and exempt from its inconveniences. The plankroad finds its way to the forests, first building itself from them, and then placing the wood treasure into active use. It allures the settler to redeem lands, hitherto set down as desperate real estate—~~unreal~~ as to *income*, and *real* only as to *taxation*. It goes up into wild lands

and civilizes them. It threads the environs of a city with pleasant drives. It magnifies the means used by the farmer in taking his products to market. *It is the road of the people*, open to all, and like the nation in whose energies it has grown into such favor, it is every year increasing its range, and extending its benefits." *Hunt's Merchants' Magazine.*

No. 86.—COMMISSIONERS OF ROADS for the 505th District, plaintiffs in error, *vs.* THE GRIFFIN AND WEST POINT PLANKROAD COMPANY, defendant in error.

[1.] An appeal entered by an attorney at law, without authority from the party, is void.

Motion to dismiss appeal. Heard and decided by Judge STARK, in Pike Superior Court, August Term, 1850.

An appeal was taken to the Superior Court of Pike County, from an award rendered by Commissioners appointed under the provisions of the charter of the Griffin and West Point Plankroad Company, to ascertain the compensation to be paid by said Company for appropriating the public road, leading from Griffin to the Flat Shoals, on Flint river, through said district, as a site for their plankroad.

It appeared from the record, that the award was sanctioned and ratified by the Commissioners of Roads for said district, on the 28th day of May, 1850. On the 5th day of June, 1850, they repented, and filed their protest against the award.

The appeal was entered by W. W. Arnold, A. W. Pryor and Hartford Green, as attorneys at law.

At the hearing, August Term, 1850, of said Court, a motion was made to dismiss the appeal, upon the following, among other grounds—

Because the appeal was entered by certain persons, as at-

Allen, a slave, *vs.* The State of Georgia.

torneys at law, and who had not been employed, until after the cases had terminated by an agreement between the parties.

2d. Because there had been an agreement between the Commissioners, as to the compensation to be paid by the Company for the right of way over said public road, which had been ratified by the Commissioners of Roads for the 505th District.

The Court sustained the motion and dismissed the appeal, and counsel for plaintiff excepted.

By the Court.—WARNER J. delivering the opinion.

[1.] The first ground taken in regard to the entering the appeal by the attorneys at law, who were not employed until after the case had terminated by an agreement between the parties, is necessarily disposed of by the judgment rendered during the present term, in *The Commissioners of Roads for the 580th District vs. The Griffin and West Point Plankroad Company*, affirming the judgment of the Court below, in dismissing the appeal in that case.

Such being the fact, and the appeal dismissed upon the same ground in both cases, it is not necessary for us to consider the second ground taken in this case, in regard to the agreement. Let the judgment of the Court below, dismissing the appeal, be affirmed.

No. 87.—ALLEN, a slave, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant.

[1.] On the trial of slaves, or free persons of color, under the Act of 1850: *Held*, that it was illegal to admit in evidence the opinion of the committing Magistrates, that the person charged was guilty of a capital offence.

[2.] Where a capital offence is committed by a slave, during the session of the Superior Court, and the papers are returned, it is competent for the Court to proceed to trial at that term.

Indictment for murder, in Bibb Superior Court. Tried before Judge STARK, July Term, 1850.

At the July Term, 1850, of Bibb Superior Court, Allen, a slave belonging to David Flanders, was put on his trial for the alleged murder, in said County, of Sam, a slave, the property of John B. Lamar.

In the progress of the trial, it appearing from the testimony of one of the witnesses, that the homicide was committed during the then session of the Superior Court, defendant, by his counsel, objected to the farther progress of the cause, and moved the Court for a verdict, on the grounds—

1st. Because the defendant could not by law be indicted and tried at the then present term of said Court, but must be indicted at the next term of said Court after the commission of the alleged offence, as required by Statute.

2d. Because the indictment did not allege affirmatively the proceedings had before the committing Magistrates, viz: the affidavit, the warrant, the arrest, and notice in writing by the Magistrate issuing said warrant, to two, or more of the nearest Justices of the Peace, to associate with him on a particular day therein specified, not exceeding three days from the date of said notice, for the trial of said slave.

The Court overruled the motion, and counsel for defendant excepted.

When the opinion in writing of the Magistrates before whom the defendant was tried, was tendered in evidence, defendant, by his counsel, objected thereto—

Because the opinion and order in writing tendered, was different from that set out in the bill of indictment, in this, to wit: the indictment alleged an order, signed by Ebenezer C. Granniss, Eliphalet E. Brown and William Shivers, Justices of the Peace, and the opinion in writing tendered, was signed by Eliphalet E. Brown, William Shivers, Junior, and Ebenezer C. Granniss, Justices of the Peace.

The Court overruled the objection, and admitted the writing

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tendered in evidence, and counsel for defendant excepted, and upon these several exceptions has assigned error.

HARDEMAN, HALL & HALL, for plaintiff in error.

GLENN, (representing Sol. Gen. *McCune* and *Poe & Nisbet*,) for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] In the case of *Anthony, a slave, vs. the State of Georgia*, decided at Savannah in January last, this Court held, that in the prosecution of a slave under the Act of 1850, it was not necessary to set forth, in the bill of indictment, the opinion of the committing Magistrates, that the slave charged was guilty of a capital offence, and the other papers appertaining to the charge; and that it was not necessary to prove them on the trial. We there held that the requirement of the Statute that they should be transmitted to the Solicitor or Att. General, was directory to him, and that they constituted no part of the pleadings or proof on the trial. That decision controls the first point made in this case. If it is not made necessary to prove these papers by the Statute, then we hold that their admission is wrong, upon principle. By the Act, the slave is to be indicted and tried, as in cases of white persons. No evidence can be admitted against him, that is not legal, according to the rules of evidence, as they obtain in other cases on the criminal side of the Court. The *opinion* of the committing Magistrates, that the prisoner is guilty of the offence charged, is clearly illegal evidence, and ought not to be admitted. In this case, the presiding Judge instructed the Jury that they were not to regard it, in passing upon the guilt or innocence of the prisoner. Notwithstanding it may have had its effect upon their minds—and *what* effect, it is impossible for the Court to know. It is proper to withhold from the Jury all illegal evidence which, by possibility, may influence their verdict. The presiding Judge may pronounce it no evidence; yet its impression is made on the mind, and may influence the verdict, in despite of

all the efforts of the Jury to disregard it. In construing this benign Act, we wish to give to the slave the full benefit of all its provisions. We thus decide, not so much because we have reason to believe that this evidence did, in this case, affect the verdict, as for the sake of what we believe will be a salutary rule, in all trials under the Act of 1850. Upon the ground alone that it was error to admit this evidence, we send this case back, and find it unnecessary to consider the question of variance.

[2.] The requirement in the Act, that these papers shall be transmitted to the Attorney or Solicitor General, "on the first day of the next term of the Superior Court," is not intended to give time to the accused to prepare his case, and to give time for public opinion to cool, as argued by the plaintiff's counsel; but it is to prevent delay in the prosecution, and the costs of confinement in the jail. It is to enable the Solicitor General to proceed within that term, with convenience, to send out a bill, and bring the cause to a hearing. When, therefore, the offence is committed within the term, as here, and the papers are returned within the term, and the cause is regularly called for trial, it is triable at that term. The shortness of the time intervening between the commission of the offence and the trial, would no doubt be considered by the Court, upon an application for a continuance by the prisoner.

Let the judgment be reversed.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT CASSVILLE,
APRIL TERM, 1851.

Present—JOSEPH H. LUMPKIN,
HIRAM WARNER,
EUGENIUS A. NISBET, } Judges.

No. 88.—LEWIS HOUSE, *et al.* plaintiffs in error, vs. AARON PALMER, defendant in error.

- [1.] A reservation in a deed for the benefit of the grantee, must be strictly complied with.
- [2.] If the vendor in selling a lot of land, retains the right to test it for gold within eighteen months, and if found profitable to work it, he must make the examination and give notice of the result within the time limited; otherwise, the privilege will be forfeited.
- [3.] More than seven years' notorious, peaceable, and adverse use and occupation of gold mines, where the party has gone into possession of the land under deed, will give a statutory right, notwithstanding the vendor has reserved the exclusive privilege of working said mines.

In Equity, in Lumpkin Superior Court. Decision by Judge JOHN H. LUMPKIN, March Term, 1851.

Aaron Palmer, the defendant in error, filed his bill in Lumpkin
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Superior Court, setting forth the following facts: That in 1833, Lewis House being the drawer and grantee of a lot of land in Lumpkin County, conveyed the same to one John McClure, by a deed, in which was a reservation to himself of the gold on the premises, and the right of digging therefor, on condition that he (House) should test the lot for gold within eighteen months, and have the right of digging, if it should prove profitable; but if he should fail to test it in that time, his right to cease and be void. In 1837, McClure sold the lot to Palmer, the complainant, subject to the reservation in the former deed.

Complainant charged, that no test had, within his knowledge, been made of the lot in the time limited; that he bought with the understanding that no test had been made; that he had afterwards heard a report, that it had been tested, but had not proved profitable, but did not know whether it was true or not; that for more than seven years he had, from time to time, been mining on the land without interruption; that some time in 1849 or 1850, Matthew C. Halen entered on the land, under a lease from House, executed about that time, and commenced mining for gold, and continued so to do. Whereupon, complainant prayed an injunction against House & Halen, to forever restrain them from mining on said lot.

To this bill, defendants filed a general demurrer, for want of equity, which was, on argument, overruled by the Court; to which decision defendants excepted.

MARTIN, for plaintiff in error.

BROWN & HANSELL, for defendants.

By the Court.—LUMPKIN, J. delivering the opinion.

This was a bill filed by Aaron Palmer to restrain Lewis House and Matthew C. Halen, his lessee, from digging gold on lot No. 501, in the 13th district and 1st section of what was originally Cherokee, now Lumpkin County. Lewis House was the drawer of the land, and he conveyed the same to one John McClure, in 1833, reserving to himself the right of digging gold on the

premises, on condition that he should test the lot within eighteen months, and find it profitable ; failing to do this, his right was to cease and to be of no effect.

In 1837, McClure sold the land to Palmer, the complainant, subject to the same reservation. The bill charges, that at the time this last conveyance was made, it was the understanding of the complainant, that House had waived all his right under his deed to McClure, "by having failed to test the lot within eighteen months, according to the condition in his deed." It further charges that, "more than four years having elapsed from the date of House's sale to McClure, and House having made no pretension to work on the lot, or given notice to McClure of his purpose to do so," that he had good reason to believe that House had forever relinquished all his right in said lot, and that he bought with this belief. It further charges, "that it was not true that a test had been made in compliance with the requisition in the deed to McClure, or that notice had been given to the complainant that he found the mine profitable, and intended to work it."

The complainant states, "that having purchased under these circumstances, afterwards, to-wit: in 1840, he commenced operating on the lot for gold, believing and claiming that the gold as well as the land, was rightfully his property; and that from that year down to a recent period, and for more than seven years, he has at frequent intervals, and as constantly as he could spare his hands from other employment, worked for gold on said lot; during most or all of which time, he has had on said lot, his mining tools, utensils, troughs, &c. or some of them; claiming and holding the same independent of the right of all other persons, while House has not at any time during this period, made any attempt to operate on said lot."

To this bill, defendants filed a general demurrer, for want of equity, which was on argument, overruled by the Court. And it is to reverse this decision, that this writ of error is prosecuted.

It will be observed, that it is not denied that the case made by the bill, is a proper subject matter of injunction. The controversy is one of title.

[1.] We take this to be the obvious meaning of the reservation in the deeds. House stipulated that in parting with the land, he was to retain the right to the minerals, *provided*, he tested them within eighteen months, and was satisfied that it would be profitable to work them.

[2.] This condition, then, was for his benefit, and imposed upon him a plain duty, failing to perform which, he forfeited the privilege which otherwise would have been permanently secured. The bill charges substantially that he neglected to test the mines within the year and a half limited, or to give notice that he had found them productive, and intended working them.

His failure to make the test, was of itself a forfeiture of the privilege. But we are further of the opinion that he should have given notice of the result. This was not a secret to be locked up in his own bosom and suffered to slumber there, or be published, as future and more thorough experiments, the employment of new and improved machinery, or other circumstances might suggest. It was a thing to be done and declared within a fixed space, or it was forever too late. Deeds are to be taken most strongly against him who is the agent or contractor, inasmuch as the instinct of self-preservation will always make men sufficiently careful to protect themselves—*verba fortius accipiuntur contro proferentem*. And it would be manifestly wrong to hold, that McClure and Palmer were to be kept forever in doubt and uncertainty, as to the determination of House. All who might subsequently buy the land, had the right to know whether they took it with or without the burden. House's notice that he had made the test, was therefore indispensable, according to the statements in the bill then, which are admitted by the demurrer to be true. Palmer took the title, discharged from the incumbrance.

[3.] But suppose it were otherwise—if he went into possession *bona fide* under his deed, and worked the mine publicly, notoriously and uninterruptedly for about ten years, claiming them as his own and against all other persons whatever, we think he has acquired an indefeasible statutory title, and that he is thus doubly fortified against the aggressions of the adverse party.

No. 89.—JANE DAVIDSON *et al.* plaintiffs in error, *vs.* CARTER & RITCH, defendants in error.

- [1.] On the trial of a *scire facias* against the principal and his securities upon a bail bond, the defendants are not entitled to a Jury trial, unless they file such an issuable plea as will require the intervention of a Jury to try it.
- [2.] When it appears, on the face of the record, that there was a competent number of Jurors to render a verdict, such verdict may be signed by one as Foreman, in behalf of himself and his fellow Jurors.
- [3.] Where the names of the securities to a bail bond were inserted in the first part of the bond, and signed by them, but their names were omitted in the condition of the bond: *Held*, that such omission in the condition of the bond, did not alter the legal effect of the instrument.
- [4.] Where an affidavit to hold to bail, stated that the plaintiff *claimed* a certain sum to be due him from the defendant: *Held*, that such an affidavit was a substantial compliance with the 13th section of the Judiciary Act of 1799.

Scire facias, in Murray Superior Court. Decided by Judge JOHN H. LUMPKIN, April Term, 1851.

The facts of this case are as follows: Carter & Ritch had issued bail process against one Charles B. Word, and Jane Davidson and James M. Owen, the plaintiffs in error, had become his sureties. Word having failed to appear, the plaintiffs, after judgment obtained, issued *scire facias* to charge his sureties with the debt.

The defendants filed two pleas—

1st. That there was no such bond as the one sued on.

2d. That there was no such record as that described in the *scire facias*.

And, on the filing of these pleas, moved the Court to pass the case till the second term, to be then tried by a Jury. This motion was refused.

Plaintiff then offered in evidence the verdict and judgment against Word, which was objected to, on the ground that the verdict was not signed by the Jury, but only by one person, calling himself Foreman. This objection was overruled, and the evidence admitted.

Davidson and others vs. Carter & Ritch.

Plaintiffs then tendered the bond of defendants for the appearance of Word. Defendants objected, on the ground that the names of the sureties did not appear in the condition of the bond, which read as follows: "Now, if the said Charles B. Word, in case he is cast in said suit, shall well and truly satisfy the condemnation of the Court, or render his body to prison, in execution of the same, in terms of the law in such case made and provided, and upon failure thereof, *the said* — will do it for him, then the above obligation to be void, else to remain in full force;" which objection was overruled by the Court.

The plaintiffs then tendered the affidavit of their attorney, made to obtain the bail process, which stated, "he claims the sum of forty-nine dollars and twenty-three cents, besides interest, to be due the said Carter & Ritch," &c.

To this defendants objected, on the ground that the affiant does not state that the sum claimed is due; which was overruled by the Court, and the evidence admitted. The Court then gave judgment for plaintiffs, and the defendants excepted to the several decisions above stated.

MARTIN, for plaintiff in error.

AKIN, for defendant.

By the Court—WARNER, J. delivering the opinion.

[1.] The first objection is, that the Court below overruled the defendant's plea, and gave judgment at the first term, without the intervention of a Jury. In *Reed vs. Sullivan*, (1 *Kelly*, 292,) we held, that if the defendant filed such an issuable plea as required the intervention of a Jury, he was entitled to a Jury trial. The two pleas filed by the defendants in this case were not such issuable pleas as required the intervention of a Jury. The first plea is a plea of *non est factum*, and under the provisions of our Judiciary Act of 1799, ought to have been supported by an affidavit of the truth thereof, which does not appear to have been done, and the Court below properly overruled it as a valid ground

of defence. The second plea is a plea of *nulla in re record*, which was very properly decided by the Court, upon an *inspection* of the record; for a record is of too high a nature to be tried by a Jury, or in any other way than by itself. 3 Bl. Com. 331. Gould's Pleading, 313, §17.

[2.] The next objection is, that the verdict of the Jury, rendered in the original suit, was not signed by all the Jurors, but only by one, describing himself as *Foreman*. That the record should show upon its face there was a competent number of Jurors to render a verdict, is unquestionably true; but that is not the objection here. This verdict is signed by the Foreman for himself and his fellow Jurors, in accordance with the uniform practice of our Courts.

[3.] The defendants also objected to the bond when tendered in evidence, because the names of the securities were omitted in the *condition* of the bond. The names of the securities were inserted in the first part of the bond, and the omission of their names in the condition does not, in our judgment, alter the legal effect of the instrument. The objection to the bond was, therefore, properly overruled by the Court below.

[4.] Another objection was made to the affidavit to hold the defendant in the original suit to bail. The affidavit was made by the attorney of the plaintiffs, who stated therein, that "he claims the sum of forty-nine dollars and twenty-three cents, besides interest, to be due the said Carter & Ritch, from Charles B. Word, of said County, by a promissory note," &c. The objection is, that the deponent swears that he "*claims*" the sum of forty-nine dollars and twenty-three cents, besides interest, to be due the said Carter & Ritch, from Charles B. Word; whereas, it is contended the affidavit should have stated positively, that such sum was due, without saying he *claimed* it to be due. The Statute requires that the plaintiff should make oath of the amount *claimed* by him, &c. Prince, 422. The affidavit was made according to the requisitions of the Statute, and, therefore, a good affidavit to hold the original defendant to bail.

Let the judgment of the Court ~~below~~ be affirmed.

No. 90.—LORENZO D. DAVIS, plaintiff in error, vs. MARTIN LOWMAN and BERRY LOWMAN, administrators of GEORGE LOWMAN, deceased, defendants in error.

[1.] A new trial will not be granted for irregularity in the verdict, in this, that the Jury heard the statement of one of their fellows in relation to the case in their box, unless a brief of the evidence be filed in pursuance of the rule of Court.

[2.] The Court will not in such a case grant a new trial, if it is clear and manifest that there was evidence sufficient to sustain the finding, wholly independent of the statements made in the Jury box.

Motion for new trial, in Lumpkin Superior Court. Decided by Judge JOHN H. LUMPKIN, March Term, 1851.

This was a claim case, in which the Jury, on the trial of the appeal, returned a verdict for the claimant. Plaintiff in *fi. fa.* moved for a new trial, on the ground that the Jury after they retired to consider of the case, had improperly heard, from one of their number, testimony which had not been introduced in Court. Certain affidavits were filed with the rule *nisi*, as to the fact alleged.

When the motion was called up for a hearing, the claimant's counsel moved to discharge the rule, on the ground that no brief of the testimony taken in the cause had been filed, as required by the 61st Common Law Rule. The motion was sustained by the Court, and the rule for a new trial was discharged.

To which plaintiff in *fi. fa.* excepted.

UNDERWOOD & MARTIN, for plaintiff in error.

HANSELL, for defendant.

By the Court.—NISBET, J. delivering the opinion.

[1.] The Circuit Judge refused to entertain the rule for a new trial, upon the ground that a brief of the testimony had not been filed in pursuance of the rule of the Court. He could not have

done otherwise without disregarding the rule, which requires without any qualification, a brief of the testimony to be filed *in all cases*, and without disregarding the decision of this Court, which requires a brief of the testimony agreed upon by the parties, or their counsel, or approved by the Court, to be filed, and such approval or agreement to be entered upon the minutes, at the term at which the judgment is rendered. *Hotchkiss*, 951. 1 *Kelly*, 254.

It is said, however, that in this case the reason of the rule ceases, and therefore, the rule is not applicable. Is this true? The ground relied upon for a new trial was irregularity in the verdict, in this, that the Jury received in their box, the statements of one of their fellows, which influenced their verdict. It is well settled, that if illegal testimony is admitted on the trial, a new trial will not be granted on that account, if the Court believes that there was clearly testimony sufficient to sustain the verdict, wholly independent of the illegal evidence. It is within the sound discretion of the Court to refuse the new trial, if upon a careful survey of the evidence, it is clearly sufficient to sustain the verdict, irrespective of the illegally admitted testimony. *Graham*, 246, 78. 1 *Kelly*, 580.

[2.] It is true, it is difficult to say when the illegal testimony does not affect the verdict, or how far in any case it influences the mind of the Jury. Hence the discretion of the Court must be carefully exercised. If the case is plain—if the Jury would, in the judgment of the Court, be compelled to find as they did find, had the illegal evidence not been admitted, then the new trial will be denied. This being so, the Court must have the evidence before it, in order to judge of the propriety and rightfulness of the new trial. This discretion cannot be exercised without a brief of the evidence. In such a case then, the reason of the rule does not cease, but is clearly strong. It is stronger if possible in this case. For if the Court may refuse a new trial in a case where illegal evidence has been admitted on the trial, it may refuse a new trial in a case where the Jury have listened to mere statements in their box.

Let the judgment be affirmed.

Rogers vs. McDill & Campbell.

No. 91.—GEORGE W. ROGERS, plaintiff in error, vs. McDILL & CAMPBELL, defendants in error.

[1.] *Land cannot be levied on and sold under an order of the Magistrates, in attachments returnable to Justice's Courts. It must be by virtue of an execution issuing upon the judgment in attachment.*

Claim, in Forsyth Superior Court. Tried before Judge JOHN H. LUMPKIN, February Term, 1845.

The record in this case disclosed the following facts: Sundry attachments had been issued from a Justice's Court in Forsyth County, against one Seaborn Corderey, in favor of different creditors. The Justice's Court had given judgment thereon, and *passed an order* that the property attached, which consisted both of land and personalty, should be sold to satisfy the attachments. The personal property was sold accordingly; the land was claimed by Rogers, the plaintiff in error, and the claim was returned to the Superior Court, together with all the attachments levied.

In the Superior Court, the attaching creditors agreed with the claimant, that the result of one of the cases in favor of one Shelton, should control them all. The case of Shelton was tried, and the Jury found for the claimant. Shelton did not appeal, but McDill and Campbell, the defendants in error, who had entered into the agreement aforesaid, entered an appeal on the minutes; in their case, in which there had been no verdict nor confession. On the trial of the appeal, claimant moved to dismiss the appeal, because it had not been entered within four days, as required by law, although the appeal on the minutes bore date within the time, and offered to introduce the Clerk to prove that the appeal bond had not really been signed on the day when it bore date, but several days thereafter. The evidence was rejected by the Court, and the motion overruled, on the ground that the appeal and bond were of record and could not be contradicted by parol. Plaintiffs then moved to dismiss the claim, because it had been interposed after judgment on the attachment, and after the order of the Justice's Court had been passed, directing the property to

be sold. Before this motion was determined, claimant moved to suspend the same, and allow him to move again to dismiss the appeal, on the ground that there had been no verdict or confession to be appealed from. The Court refused the motion of claimant and granted the motion of the plaintiff in *fi. fa.* dismissing the claim.

To which decisions claimant excepted.

No one appearing for defendant in error, the plaintiff was allowed to proceed *ex parte*.

AKIN, LEWIS & MARTIN, for plaintiff in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Upon examining this record, we find it unnecessary to decide any of the questions made in the bill of exceptions.

[1.] There is no authority of law to sell land by an order of the Magistrates, under attachment returnable to Justice's Courts. It can only be done under an execution, issuing upon the judgment in attachment. *Prince*, 503--'4. The levies, therefore, in this case, are illegal, having been made by virtue of a void process. Should the property be condemned and sold, the title would not be divested, and the purchaser would take nothing. It is useless for the litigation to continue; and with this view of the subject, we shall remand the cause, with instruction to dismiss the levies. The parties plaintiff must proceed, *de novo*, in the primary Court.

Whether a claim can be interposed in attachment, after judgment has been rendered, or the property ordered to sale, we will postpone for future investigation.

Judgment reversed.

No. 92:—ISAIAH SIMPSON, *et al.* plaintiffs in error, vs. WILLIAM H. PERRY, defendant in error.

[1.] Where the Jury, in an action of trespass against two joint trespassers, returned the following verdict: "We the Jury, find Simpson \$150, and Edwards, \$100, and all the costs to be paid by Simpson and Edwards, and fifty dollars damage to be paid by Simpson." *Held*, that the legal effect of the verdict was, that the Jury intended to find two hundred dollars damages against Simpson, the principal trespasser, and that a joint judgment should be entered against both defendants for that amount, and a remittition entered as to the one hundred dollars found against Edwards.

Trespass, in Cherokee Superior Court. Tried before Judge JOHN H. LUMPKIN, February Term, 1851.

This was an action brought by William H. Perry against Isaiah Simpson and Stephen Edwards, for assault and battery.

The verdict of the Jury was as follows: "We the Jury, find Simpson, \$150, and Edwards, \$100, and all the costs to be paid by Simpson and Edwards, and fifty dollars damages to be paid by Simpson."

This verdict was returned to the Clerk during the recess of Court, and the Jury dispersed.

Before the verdict was recorded, the Court permitted plaintiff to take an order to amend it, and it was amended to read, "We the Jury, find for the plaintiff, three hundred dollars, with costs of suit," which the Court directed the Foreman of the Jury to sign, and the former verdict was expunged from the declaration; the Court holding that the verdict as amended only expressed in proper form, the intention of the Jury as manifested by the verdict which they returned.

To which action and order of the Court, defendants excepted.

BROWN, for plaintiff in error.

HANSELL, for defendant in error.

By the Court.—WARNER, J. delivering the opinion.

[1.] The only question made by the record in this case is, as to the legal effect of the verdict returned by the Jury.

The defendants were sued *jointly*, as trespassers, for an assault and battery. The evidence in the record shows, that Simpson was the principal trespasser. The verdict is in the following words and figures : “ We the Jury, find Simpson, \$150, and Edwards, \$100, and all the costs to be paid by Simpson and Edwards, and fifty dollars damages to be paid by Simpson.”

The rule is, in an action for a *joint tort* against several defendants, that the Jury are to assess damages against all the defendants *jointly*, according to the amount which in their judgment, the most culpable of the defendants ought to pay. 2 *Greenleaf's Ev.* §277.

The Court below ordered the verdict to be amended so as to find three hundred dollars jointly against both defendants. In this ruling we think the Court erred in its judgment. The highest amount which the Jury intended to find against Simpson, was two hundred dollars. This intention is manifested by adding the \$150,00, and the fifty dollars damages together. Simpson being the most culpable, the Jury intended he should pay the most ; but there is nothing in the verdict which shows they intended he should pay more than two hundred dollars. The one hundred dollars which the Jury intended to find against Edwards alone, ought not to have been charged against Simpson by the verdict, for the reason, it does not appear the Jury intended to find so much as three hundred dollars against him. The judgment of the Court below must be reversed, and the verdict amended, so as to find two hundred dollars against the defendants *jointly*, and enter a remittition as to the one hundred dollars found against Edwards.

No. 93.—LEWIS A. DUGAS, plaintiff in error, vs. JOHN R. MATHEWS *et al.* defendants in error.

- [1.] Upon the trial of an issue formed on the answer of garnishees, on the appeal, it is competent for them to take exception to the evidence of the plaintiff, tendered to show that he is the assignee of the judgment upon which the garnishment issued.
- [2.] The transfer of a negotiable note, upon which suit is pending, held to convey such an interest in the judgment obtained thereon in the name of the transferrer, as will enable the transferee to sue out process of garnishment thereon.
- [3.] Under the Act of 1829, authorizing the transfer of judgments and executions, by written assignment or control: *Held*, that a formal deed of assignment is not necessary, but that evidence in writing, which shows that the plaintiff has conveyed the interest in the judgment or execution to the person claiming to be assignee, will be sufficient to enable him to sue out process of garnishment thereon.

Garnishment, in Habersham Superior Court. Tried before Judge JAMES JACKSON, October Term, 1850.

This was a summons of garnishment, issued in the name of Lewis A. Dugas, as a creditor of the Habersham Iron Works & Manufacturing Company, on a judgment obtained against them by Lewis F. E. Dugas, and transferred to and controlled by the plaintiff. The summons was served on John R. Mathews and James R. Wyly, who answered, denying any indebtedness to the company. This answer was traversed, issue joined and a trial had.

On the appeal, plaintiff offered in evidence the judgment obtained against the Iron Works Company in the name of L. F. E. Dugas. Defendants objected to its admission until plaintiff should show his control.

Plaintiff insisted that it was too late at that stage of the case to contest his right to issue the garnishment, which was overruled by the Court.

Plaintiff then offered a written assignment by L. F. E. Dugas, of the original note of the Habersham Iron Works & Manufacturing Company, to the plaintiff, L. A. Dugas, given while

the note was in suit, and also a letter of said L. F. E. Dugas, written since the judgment was obtained, in which he stated that he had transferred said judgment to Lewis A. Dugas.

The Court held that the evidence was not sufficient to show that plaintiff was entitled to control said judgment, so as to issue summons of garnishment thereon, and ruled out the evidence accordingly.

Whereupon the plaintiff suffered a verdict, and excepted to the ruling of the Court on the points stated.

STANFORD and COBB & HULL, for plaintiff in error.

J. W. H. UNDERWOOD, for defendants.

By the Court.—NISBET, J. delivering the opinion.

[1.] The exception taken upon the trial, to the admissibility of the evidence going to show the plaintiff's control of the judgment and execution, was not, in our judgment, too late. The argument against the exception being within time is, that the garnishees having answered, and joined issue upon the truth of that answer, have admitted the plaintiff's right to summons them; that is, they have admitted that he, in this case, is the owner of the judgment upon which the summons issues. Farther, it is said that the evidence is irrelevant to the issue, that being a single question, to wit: indebtedness or not, on the part of the garnishees to the defendant in execution. It is true that this is the issue, and the plaintiff in garnishment holds the affirmative; but upon the trial of the issue, either at Common Law or on the appeal, he must first show himself rightfully in Court. He must show that he is the creditor of the creditor of the garnishee. That is a part of his case. The answering of the garnishees does not admit that—indeed, it admits nothing. They are not estopped by answering, to deny the plaintiff's ground of process against them. The control of the judgment was the foundation of the plaintiff's proceedings against the garnishees. It was incumbent on him to show it on the trial. Any exception then, to the competency of the evidence to prove it, was regular.

[2.] The next and only farther question made in this record is, did the Court err in rejecting the evidence offered by the plaintiff to prove it? To determine this question, it is necessary to advert to the Statutes which authorize garnishments, and to the state of the pleadings. By the Act of 1822, it is made lawful for the plaintiff or his attorney, to issue summons of garnishment in all cases pending in any Court of the State, provided the plaintiff, his agent or attorney, shall make affidavit of the amount of the debt or demand which he believes to be due, and that he is apprehensive of the loss of the same, or some part thereof, unless such summons do issue. This affidavit is filed in the office of the Clerk of the Court where the suit is pending. By the Act of 1834, the provisions of this Act are extended to all cases, whether at Law or in *Equity*. By the Act of 1822, garnishment issues in behalf of a plaintiff in a judgment, upon the oath of the plaintiff, his agent or attorney, (in addition to the oath required in cases of suit pending as stated above,) if required to make oath by the defendant, the garnishee, or the plaintiff or his attorney, in any younger judgment, that he believes the sum apparently due on the judgment and claimed by him, is actually due, provided the proper officer shall enter on the execution issued on the judgment, that there is no property to be found. *Prince*, 36, 37, 41. Under these Acts, the proceedings in this case were instituted upon the oath of Col. Stanford, the attorney of the plaintiff in garnishment. His oath corresponds with the declaration in regular suits, and is the plaintiff's initiatory pleading. Strictness in pleading is not required under our Garnishment Laws. The plaintiff's case is regularly brought before the Court, if the oath contains all that the Statutes require. This oath does contain the statutory requirements. It contains more, and more became necessary by reason of the peculiar features of this case. Col. Stanford swears that he is the attorney at law of Lewis A. Dugas; that the Habersham Iron Works & Manufacturing Company, (the defendants in the judgment,) are, as he believes, justly indebted to Lewis A. Dugas in the sum of \$3245, upon a judgment obtained by Lewis F. E. Dugas against that company, and that Lewis A. Dugas

has the legal control of that judgment. He farther swears, that he believes the sum apparently due and claimed on the judgment, is actually due to Lewis A. Dugas, and that he is apprehensive of the loss of the same, or some part thereof, unless summons of garnishment do issue. Upon this affidavit the summons issued. The garnishees appeared and answered, denying any indebtedness to the Habersham Iron Works & Manufacturing Company. The plaintiff traversed the answer, and the garnishees joined issue. This issue was on trial on the appeal, when the plaintiff tendered in evidence the judgment in favor of Lewis F. E. Dugas, which was objected to, upon the ground that it was a judgment in favor of a third person. The Court ruled it out, until it was shown that the plaintiff in garnishment, Lewis A. Dugas, had the control of it. To show the control, he then tendered in evidence two papers—one, a copy of the note upon which the judgment was founded, with the following indorsement thereon:

“I do hereby, for value received, which I hereby acknowledge, transfer to Lewis Alexander Dugas, all my right, title and interest to the notes now in suit by Dugas & Allen, plaintiff’s attorneys, a full description of which is herein written out in full.

[Signed,] LS. FRED. E. DUGAS.

Augusta, 27th December, 1841.”

The note thus transferred, was identified as the note upon which the judgment was founded, and upon which the suit was, at the time of the transfer, pending. It was a negotiable note, being payable to the order of Lewis F. E. Dugas, the assignor, and also the plaintiff in the suit then pending.

The other paper was in these words:

L. F. E. Dugas <i>vs.</i> The Habersham Iron Works & Manufactu- ring Company.	}	<i>Fi. fa.</i> from the Superior Court of Habersham County, Georgia, and issued upon a judgment obtained April Term, 1842.
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To John R. Stanford, attorney at law:

Having assigned the above judgment and execution to Lewis

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A. Dugas, you are authorized to use my name in any proceeding yourself or the said Lewis A. may deem necessary to the collection of said debt, and you are authorized to act as my attorney in any Court proceeding instituted for the collection of the same, should you deem the use of my name necessary. June 17th, 1846.

[Signed,] LS. FRED. E. DUGAS."

Both of these papers were objected to, upon the ground that neither of them singly, nor both together, constituted such an assignment as is contemplated by our Statute. The Court sustained the objection, and thus we have the question as well as the *status* of the case when it was made.

For obvious reasons, I consider these papers separately, and, first, the assignment of the note. Did this paper give to the plaintiff in garnishment, such a control over and property in the judgment, as would authorize him to issue garnishment upon it? That is the question. If it did, the Court erred in rejecting it. We consider that Lewis A. Dugas, the plaintiff in garnishment, acquired by the transfer of the note upon which the judgment is founded, pending the suit thereon, such an interest or property in the judgment as would enable him to sue out and maintain the proceeding by garnishment. The note being negotiable, he acquired a title to that by the transfer, and the right to control it in the hands of the attorneys who had instituted the suit. By the transfer of the note, the suit pending on it, he became the usee of the plaintiff; that is, the equitable owner of the interest in the suit. It is a legal inference from the transfer of the note, that the suit then pending should proceed for the use and benefit of the transferee. Such we consider the effect of the transfer. It would have been competent for him to have dismissed the suit, and sued on the note, in the name of the payee for his use, by striking out the written transfer, if it had been transferred by the usual indorsement. The note itself showed no title out of the plaintiff in the action; nor was it competent for the defendant to question the plaintiff's title, unless it became necessary to

sustain some equitable defence. The judgment, therefore, is a valid, subsisting judgment, and could not now be set aside for irregularity. The transfer of the note, then, placed him in the position of the usee of the action, and of the judgment when obtained. The record, it is true, of the judgment, exhibits the plaintiff as the legal owner of the judgment, but the evidence shows that he holds the title to it for the use of the transferee. In Equity he is the owner of the judgment—he is, as such, entitled to the money raised on it, and his receipt would be a protection to the defendants. We hold that an equitable ownership or title to the judgment, is such a title as will authorize the suing out of garnishment. There can be no doubt but that the assignee in this case could, in a Court of Chancery, apply a debt due by the garnishees to the defendants in the judgment, to that judgment, upon his claim, as holding the equitable title to it. If so, why go into Chancery, if our Statute gives him a remedy at Law? The proceeding by garnishment is in the nature of, and a substitute for a proceeding in Chancery. Particularly is this position true in this State, where we have a Statute which authorizes a party to proceed at Law, in all cases where he may conceive that the legal remedy will be sufficient. The only reply to this is, the language of the Statute, which simply authorizes the *plaintiff*, or his agent or attorney, to sue out a garnishment on the judgment. It will not do to put too literal a construction on it. For the purposes of this proceeding, and in the spirit of the Act, the real owner of the judgment is the assignee. This construction would, before our Statute, have denied to the transferee of a judgment, assignable at Common Law, the benefits of our Garnishment Laws. Our Statute authorizing the assignment in writing of a judgment, empowers the assignee to collect it in his own name, and, as I conceive, admits him to the remedy by garnishment. Before that Statute, the proceeding to collect was, no doubt, in the name of the plaintiff for the use of the assignee. So we have held, that the assignee of a dormant judgment may revive it, by *scire facias*, in the name of the plaintiff for his use. 7 Ga. R. 204. Here, the title to the judgment, by the transfer of the note, is not set up under the Statute,

but under the Common Law. How, then, was the proceeding to be instituted? It could not be instituted by the plaintiff, L. F. E. Dugas, because he could not swear, as the Statute requires, that anything was due to him on the judgment, for he had transferred his interest in it. The only practicable course is that taken in this case. Here the proceeding is instituted in the name of the assignee—he takes the oath (or rather his attorney)—he is the plaintiff in garnishment; but the fact of the transfer is developed in the record. It is stated in the oath, and the record brings before the Court the whole transaction. The proof offered is in accordance with the pleadings. It sustains the allegations of the oath. The transfer of the note, therefore, we think, ought to have been admitted, not as evidence of title to the judgment, under the Act of 1829, but as evidence of an equitable title acquired, upon general principles, before the judgment was had. The garnishees certainly cannot complain, for a judgment against them on this issue, would be a protection against the plaintiff in the *fi. fa.* and against their creditors, the Habersham Iron Works & Manufacturing Company.

[3.] Independent of the transfer of the note, we think that the order to Col. Stanford is a written assignment of the judgment, sufficient under the Act of 1829. That Act prescribes no form of assignment. No law makes necessary any formality in the transfer, of which I have any knowledge. It only requires that the transfer be *by written assignment or control*. That is all. It forbids all parol assignments, and makes written evidence of the transfer indispensable. Here is that evidence, under the hand of the only person that could make it, to wit: the plaintiff. It contains an acknowledgment that he has assigned this judgment to Lewis A. Dugas, and directs that his name should be used in all proceedings deemed necessary to enforce its collection. The assignment referred to as the acknowledgment is, no doubt, that of the note. This order to Col. Stanford does not give effect to *that*, as a transfer of the judgment, but the acknowledgment, coupled with instructions to use his name in all proceedings necessary to collect it, and that for the benefit of Lewis A. Dugas, is a present transfer of that judgment. It is written evi-

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dence that he was not the owner of it, and that Lewis A. Dugas was the owner. We cannot believe that the ends of justice can be subserved by requiring, under the Act of 1829, a technically formal deed of assignment. What we do require is, that there be intelligible written evidence that the judgment is the property of him who claims to be its assignee. Such we consider this order to be.

Let the judgment be reversed.

NO. 94.—ALFRED SHORTER, *et al.* plaintiffs in error, *vs.* WILLIAM R. SMITH and THE JUSTICES OF THE INFERIOR COURT OF FLOYD COUNTY, defendants in error.

- [1.] The ancient doctrine of the Common Law, that the franchise of ferry, although not declared to be exclusive, is necessarily implied in the grant, is inapplicable to both the local situation and political institutions of this country.
- [2.] This doctrine had its origin in the feudal system, and has undergone great modification, if it has not been entirely abandoned, even in England.
- [3.] Grants by the public are to be strictly construed, and nothing passes by implication.
- [4.] The whole legislative history of this State, shows that the understanding of our people has been, that exclusive privileges are never conferred, where none such are expressly given by the charter.
- [5.] The Legislature, or the Inferior Court, as its agent, after having chartered a company, to make a particular improvement for public accommodation, without any provision that no rival improvement should afterwards be authorized, may grant a charter to another company or individual, to make an improvement of the same or of a different kind, to afford the like accommodation, however the work of the junior company might impair, or even destroy the profits of the elder.
- [6.] It is competent for the Legislature to grant charters with exclusive privileges, but should a change in the business, population and intercourse of the country require it, new avenues may be opened, within the limits of

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such exclusive grant, by providing just compensation. There is no difference between a franchise and any other property in this respect; all may be made subservient to the public use, provided the public faith be not violated in making adequate remuneration.

[7.] Does a grant to build a bridge, confer a ferry right, and *vice versa*?
Quere.

In Equity, in Floyd Superior Court. Decision by Judge JOHN H. LUMPKIN, at Chambers, April 12th, 1851.

The plaintiffs in error filed their bill, alleging the following facts: That they were the owners, and in occupation of certain toll bridges over the Etowah and Oostanaula rivers, near their junction at the Town of Rome; that those under whom they hold were, from the time of the first settlement of the country by the whites, owners of the land, and of a ferry privilege over said rivers; and that being the owners, and in undisturbed possession thereof, they did, in 1834, propose to the Justices of the Inferior Court then in office, and to the said County of Floyd, as a consideration for the removal of the County site from Livingston, and its permanent location at Rome, the following terms: 1st. That they would give to the Inferior Court, for the use of the County, one-half of the proceeds of the sale of town lots, on lot of land No. 245, in the 23d district 3d section, and that suitable lots should be selected thereon for a Court-house, jail, academy and three churches.

2d. They proposed to pay to the citizens of Livingston, the actual value of all their improvements made in said town, the improvements to belong to them; the value to be assessed by three respectable and disinterested citizens, the payment to be made out of the first proceeds of the sale of town lots realized by them.

3d. They proposed to keep a free ferry at the head of the Coosa river, for the benefit of free passage of the citizens of Floyd County upon foot and on horseback, except persons passing and repassing to their farms.

4th. The sale of the town lots at the head of Coosa, together with the collection and equal division of the proceeds of said lots, to be under the joint management of the said Court and the company.

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These propositions were submitted to a vote of the people of the County, and being accepted by a large majority of the voters, they were ratified by the Inferior Court, and entered on their minutes as a judgment and order of the Court.

Complainants further stated, that all the arrangements contemplated in said proposition were carried into effect, and that the conditions on both sides were performed; that they substituted bridges for ferries, to meet the public convenience, and had been for many years, and ever since the settlement of the County, in the peaceable enjoyment of their franchise. They claim to have acquired by prescription, a right to said franchise, and moreover, that the agreement between them and the County, above stated, was in full force, and sufficient in law, to protect them from any infringement of their exclusive rights.

They alleged, however, that the Inferior Court of said County, now in office, had passed an order, authorizing the defendant, William R. Smith, to erect a bridge over the Etowah river, within the corporate limits of the Town of Rome, and within one mile or less of complainant's bridge over the same river; which complainants charge, will be an injury to them, and a violation of their franchise; and they pray that defendants may be enjoined from proceeding further therein. The application for injunction being heard before Judge Lumpkin, at Chambers, was refused by him; to which decision complainants excepted.

UNDERWOOD and ALEXANDER, for plaintiffs in error.

McDONALD, for defendants.

Points made by counsel for defendants in error.

Complainants do not show a prescriptive right either for a ferry, or an exclusive right to a ferry.

To constitute a prescriptive right, the enjoyment must have existed time out of mind. 1 *Black. Com.* 75. 2 *Ib.* 263.

Seven years undisturbed possession and enjoyment of an incorporeal hereditament, presumes a grant. 7 *Geo. Rep.* 352.

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This prescription may be rebutted and the right destroyed, by showing the commencement of the enjoyment. 10 *East*. 476. 2 *Brof. & Bing*. 403. *Cowper*, 215. 2 *Wil*. 23.

The bill itself shows the commencement of the enjoyment but it nowhere shows the commencement of a right to have a bridge, nor the continuance of the ferry.

2d. Seven years enjoyment only presumes a grant. It presumes a naked grant from the Legislature. 7 *Geo. Rep.* 351. A grant to complainants does not preclude a grant to defendant, Smith. If complainants be the first grantee and are injured by defendant Smith's bridge, they have no right of action. It is *damum absque injuria*. 7 *Geo. Rep.* 352. 8 *Peters*, 738. 11 *ib.* 545, 546.

3d. The complainants set up a ferry right only, and no right to erect a bridge, and show that they have a bridge and no ferry. Authority to build a bridge confers no right to have a ferry, and the right to have a ferry gives no right to erect a toll bridge. 2 *Hilliard on Real Property*, 47, 68. 11 *Peters*, 541.

4th. The complainants show neither a grant nor a prescriptive right to a bridge, nor exclusive right to a ferry.

Prescription is against common right.

The complainants have no right, under their contract with the Court, to set up a franchise against the public. The authority of the Inferior Court to establish ferries, is only permissive. The ultimate control is in the Legislature. They cannot by contract bind the Legislature. They cannot bargain away the power of the Legislature. The Legislature have granted the right. *Act of 1849*.

By the Court.—LUMPKIN, J. delivering the opinion.

This is a bill praying for an injunction to restrain the defendants from building a bridge, by virtue of an order of the Inferior Court of Floyd County, across the Etowah river, at the upper end of the City of Rome, and within a distance of one mile or less, from the bridge of the complainants, on the same river. The facts alleged in the bill, are substantially the following:

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That the complainants and those under whom they claim, have a prescriptive right of ferry across each of the rivers Oostanaula and Etowah at the head of the Coosa river, and have been in the actual occupancy and enjoyment of said privilege, from the earliest settlement of the country by the whites, in 1830; that being so thereof possessed, on the 26th day of May, 1834, they proposed to the Justices of the Inferior Court of Floyd County, and to the people of said County, that as a part consideration for the removal and permanent location of the public buildings of said County, from Livingston to Rome, they would keep a ferry at the head of the Coosa river, for the free passage of the citizens of Floyd County, on foot and on horseback, except persons passing and repassing to and from their farms; which offer was accepted and ratified with great unanimity by the Court and the County.

That the ferry owners did in good faith, conform to and carry out every obligation imposed upon them by the contract; that, for the greater safety and convenience of the citizens of Floyd County and the travelling public, they have erected on each of said rivers, and within the corporate limits of the City of Rome, safe and durable bridges, at a heavy expense, on which, both rivers are now crossed; and that they have from time to time, reduced the rates of toll to meet the wishes of the people of Floyd County and others, marketing at Rome.

The bill charges, that the agreement is a solemn contract between the Court and County on the one part, and the ferry and bridge owners on the other, by which, the former are bound by a valuable consideration, to continue to the latter, the sole and exclusive use of their franchise; and that the same has been so recognized by all the predecessors of the present Court, and that no attempt has been made to disturb them until recently, and that the present Court are estopped by this uniform recognition, from erecting themselves, or of conferring upon others the right to erect any bridge, or establish any ferry, so near to that of the complainants, as to create a competition injurious to their franchise, or in any other way to injure or diminish the value of the same.

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And the complainants insist that the erection of any rival bridge which would deprive them of any portion of their profits and revenues, would be a nuisance to be restrained by injunction.

The bill further charges, that the more effectually to injure the complainants, the defendants are threatening to lay out and establish new roads in such a manner, as to divert the travel from their bridge; and are giving out that they will not only not charge the people of the County on foot and on horseback, but will permit them to cross their bridge with their wagons, also, free of toll; and charge only persons who reside out of the County, and even them, at a lower rate of toll than is exacted by the complainants; the doing of all which, they charge as illegal, and a gross violation of good faith, and an unquestionable attempt on the part of the Court, to exercise power which they do not rightfully possess; and they, therefore, pray that the said Justices of the Inferior Court may forthwith be absolutely enjoined, from erecting or authorizing to be built, the said bridge, to lay and out said new roads, &c.

In the application for an injunction, notice to defendants was ordered and a day assigned for the hearing; on which day both parties appeared by their counsel, and were heard upon the question, whether the injunction moved for should be granted. And after two days' argument, the following judgment was pronounced: "The Court refuses the injunction upon the case made in the bill."

The complainants sued out this writ of error.

I approach the decision of this case, with suitable conviction, I trust, of its importance; involving, as it does, the rights of property of the citizen on the one side, and the reserved rights of the State and the people on the other. Besides, the power of passing upon the unconstitutionality of a State law, or the acts of the Inferior Court, done and performed in pursuance of a legislative Statute, is necessarily one of great delicacy.

If the question submitted was one of first impression, we might regret that we had not more time to bestow upon its consideration. But the point has been directly made before, and solemnly discussed, and we have been called on to determine,

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whether the grant of a franchise with no express clause of exclusive rights or privileges, prevents by necessary implication, the establishment of a rival charter, which may impair its profits or take away its customers. (*Samuel Harrison, administrator, and another, vs. Edward B. Young and another. Ante, 9 Geo. Rep. 359.*) It is true that the judgment there was rendered on other grounds. The Court, nevertheless, intimated its opinion very unequivocally against the proposition; and for myself, I must say, that I entertain no reasonable doubt, as to the way in which this principle ought to be settled, especially in Georgia.

[1.] It is contended in behalf of the plaintiffs in error, who claim a ferry right by prescription, over the waters of the Etowah and Oostanaula rivers at their junction, at the City of Rome, that by the Common Law that has been adopted in this State, their franchise, although not declared so, is necessarily exclusive; and that the Legislature cannot, either directly or indirectly, interfere with it, so as to destroy or materially impair its value; that any such invasion is a nuisance, and the party aggrieved has his remedy at law, by an action on the case for a disturbance; or according to the more modern practice, he may resort to Chancery, to stay the injury by injunction.

And such, we concede, was the ancient doctrine in England. And the same principle applied to fairs and markets, if not to mills also. *Hardres' Rep. 163. Rolle's Abr. 140. 6 Modern Rep. 229. 2 Ventries, 344. Hargrove's Tracts, 59. Com. Dig. Patent F. 4, 5, 6, 7. Jacobs L. Dict. 40. 4 Term. Rep. 666. Bull N. P. 76. Willes Rep. 512, note. 3 Black. Com. 219.*

The reason assigned by Mr. Blackstone is, that "where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of the King's subjects, otherwise he may be grievously amerced; it would be, therefore, extremely hard, if a new ferry were suffered to share his profits, *which does not also share his burden.*" Now, upon the familiar maxim, that reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself, (*7 Reports, 69,*) the rule relied on by the plaintiffs in error, never should have obtained in this State, where these franchises are regulated by

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law, and similar burdens imposed upon all, for the proper discharge of their duty to the public.

But we admit that the law was formerly otherwise in Britain, and that in some of the earlier cases in this country, the Courts held that these franchises, whether expressed or implied, are so to be construed as to exclude all contiguous competition. *Ogden vs. Gibbons*. 4 Johns. Ch. Rep. 150. *Newburgh Turnpike Company vs. Miller*. 5 Johns. Ch. Cases, 101. *Livingston vs. Van Ingen*, 9 Johns. Rep. 507. *Stark vs. McGowen*, 1 Nott & McCord's Rep. 387.

[3.] But such is no longer the doctrine in this country. And notwithstanding the profound regrets expressed by Chancellor *Kent* at its overthrow, I must be permitted to say, that such a doctrine, in my opinion, is at war with the universally recognized principles of American constitutional law, and totally inapplicable to our local situation and change of circumstances. For if there be one principle settled in this country beyond the hazard of a change, it is, that in grants by the public, nothing passes by implication. See *United States vs. Arredondo*, (6 Peters, 736,) where all the cases on this subject are collected together by the learned Judge, (Mr. Justice *Baldwin*,) who delivered the opinion of the Court. The same rule is clearly and plainly stated in *Jackson vs. Lampshire*, 3 Peters, 289. *Beatty vs. the Lessee of Knowles*, 4 Peters, 108. *Providence Bank vs. Billings & Pitman*. 4 Peters, 514.

Adopt this rule of construction and apply it fairly to the case at bar, and the controversy is at an end. For it is not pretended that there is any express grant for the exclusive privilege, which is here set up.

But this question came directly before the Supreme Court of the United States, in the case of the *Charles River Bridge vs. The Warren Bridge et al.* in 1837. 11 Peters, 420. The Legislature of Massachusetts incorporated a company, to make a bridge over Charles river, giving the company the right to take toll for a certain number of years. The grant contained no exclusive privilege over the waters of the river, above or below the bridge; and the question presented to the Court was, wheth-

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er by a subsequent act of incorporation, the State Legislature could constitutionally confer on a *junior* company, the right of constructing a rival bridge which would interfere with the income of the *elder* existing corporation, which it had previously chartered.

On that question, the Court held the affirmative ; and that the construction of the *Warren Bridge* was no violation of the franchise of the *Charles river Company* ; and that as to the loss of tolls with which it was threatened, that was a consequential change, resulting from a lawful act—*dammum absque injuria*, for which the elder company had no redress.

Chief Justice *Taney*, in delivering the opinion of the Court, said : “ The object and end of all government, is to promote the happiness and prosperity of the community, by which it is established ; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A State ought never to be presumed to surrender their power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a State has surrendered for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which, a vast number of its citizens must daily pass—the community have a right to insist, in the language of this Court above quoted—“ that its abandonment ought not to be presumed in a case, in which the deliberate purpose of the State to abandon it, does not appear.” The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations. While the rights of private property are sacredly granted, we must not forget that the community, also, have rights ; and that the happi-

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ness and well-being of every citizen depends on their faithful preservation."

This decision, based as it is, upon a subject particularly within the cognizance and jurisdiction of the Supreme Court of the United States, is entitled to the highest deference. Indeed, we apprehend, that all the State tribunals will feel bound to follow it in a like case, until it is overruled.

I may be allowed to add, that the proposition which it establishes, commands my entire assent and approbation, namely: That the grant of a public road, bridge, or ferry, confers the right to construct the improvements only, and to receive certain rates of tolls; but does not carry with it exclusive privileges, where none such are expressly given; and that by grants of this description, the Legislature or the Inferior Court, acting by their authority, are not deprived of the power of making other grants side by side with the former, and in the same line of travel, provided there be no express violation in the first grant.

[4.] But apart from the adjudication and the legal logic by which it is sustained, the history of the legislation in this State shows, that it has been the uniform understanding of our people, that if the grantee intended to secure himself from competition, he must obtain a provision to that effect in his grant; and if no such provision is found, it is to be inferred, that the grant was taken with a reliance on the wisdom and discretion of the Legislature or its agents, to protect the grantee from injurious competition, by refusing to authorize any other enterprise of a similar character in the immediate vicinity, unless demanded by the exigencies of trade and travel. Every principle of sound policy forbids that existing rights should be capriciously or wantonly disturbed. We are not to presume or anticipate, that this will be done. After all, it is better that individuals should be at the mercy of the public, than that the public should be dependent on individuals.

Regretting, as I have had occasion to do before, the want of an authentic Digest of our Colonial Statutes; one of the earliest charters I find granted by the Legislature, was to secure to Joseph Bryan, the exclusive right and privilege of erecting a toll.

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bridge across the Great Ogechee river, in which it was enacted among other things, that "it shall not be lawful for any person or persons whatever, to erect any other bridge on the same river within three miles up or down from the place designated."

Marbury and Crawford's Digest, p. 47.

[5.] And from this period down to the present time, it never was dreamed, that the mere establishment of one right was in itself, a negative on the power to establish others and hence, express provisions are always introduced, for the purpose of tying up the hands of the Legislature, or its agent, the Inferior Courts of the County, from the exercise of this acknowledged right. *Clayton's Compilation*, 184. *Lamar's Digest*, 116, 119. *Dawson's Compilation*, 397. *Prince's Digest*, 302, 304, 920, 325, 343, *et passim*.

And the last Legislature has manifested its repugnance to these monopolies, in the most decisive manner, by authorizing all persons whatever, to establish ferries and erect bridges across water-courses or streams on their own land, upon certain conditions. *Pamphlet Acts*, 174. And this is right. In England and other countries, which are governed by force, the performance of public duties by inn-keepers, owners of bridges and ferries, &c. can be coerced by the enforcement of legal penalties. Not so here; we have, and in the very nature of things can have, no other protection, but that which results from free and unrestricted competition.

If, then, it be true that the history and situation of a State may be resorted to, in order to expound its legislative intentions, as was said in *Preston vs. Bowden*, (1 *Wheaton*, 115,) and that charters are to be expounded, as the law was understood when the charters were granted. (2 *Inst.* 282,) it was never the intention of the Legislature, in permitting this ferry to be set up, to bind itself that another bridge or ferry should not be established.

Our conclusion then is, that neither the terms of the grant, nor the great current of public opinion, give any countenance to the claims set up by the plaintiffs in error, founded on their ferry, for an exclusive franchise extending up and down the two rivers at their junction.

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For fifty years, we have heard of no instance in which such an implied right has been contended for. Neither individuals nor corporations ever imagined, for a moment, that they were entitled to such lateral and latitudinous privileges. Such an interpretation of legislative grants, would strike with astonishment, those who have conferred them. It would be to array fiction against fact.

Establish the doctrine, that a mere charter to build a bridge or road, or run a ferry, where no exclusive privilege is given ; no undertaking on the part of the State, that no rival work shall be erected, entitles the grantee to infer, that all competition which would diminish the amount of its income, is excluded by the very nature of the contract ; and we shall sow broad-cast over this land the seeds destined to yield in due season, the most abundant crop of litigation, ever garnered in this or any other country. Railroads have been built in every direction throughout the State, regardless of the broad privilege now claimed. How many ferries and bridges created by law have been ruined by the introduction of these newer and better modes of travel and transportation ? Yet has Mr. Parks on the Oconee, Dr. Wiley, the owner of the Tobesofkee Causeway, a most expensive work, and a hundred other properties of public improvements along these different lines, ever supposed that their rights were invaded, or any contract violated on the part of the State, by the construction of the Georgia and Southwestern railways, and the numerous other routes that web the State ?

It is urged, that these works have been built at a heavy cost, and good faith requires that nothing should be done, which, by curtailing their profits, would lessen or destroy their value. What reason is there, I would ask, for holding a franchise more sacred than the land to which it is annexed ? Or why should the rights of a company be more carefully protected than those of an individual ?

This ferry, when it was established, was suited to the then wants of the country, and owing to the increase of population and the trade to Rome, their income will be, in all probability, greatly enhanced, in despite of all the competition which may be

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set up. But suppose it were otherwise ; are ~~these~~ ferry owners to be exempted from the casualties to which all other citizens are liable? As well seek to insure them against flood and fire, as the fluctuations in public policy. Whole towns are frequently broken up, and all the property in them rendered worthless by the establishment of a new road, which diverts the business to some other point. Petersburg, once a flourishing village on the Savannah river, is now a cotton-field. One capitol in this State, has already been ruined by the removal of the seat of government, and the present has been repeatedly menaced of late, with the same calamity ; yet, who doubts the power, whatever we may think of the wisdom of these changes? While we reprobate that fickleness, which, without any adequate public consideration, would sport with the prosperity and happiness of a whole community, still, it must be conceded, that in the march of empire and civilization, these vicissitudes are inevitable. To-day, wealth and splendor—to-morrow, dilapidation and ruin. Such is human life—such the past record of our race, individually and collectively.

If the facts charged in the bill be true, will not the owners of real estate, city lots on the streets leading to the old bridge, be equal sufferers, if the present trade and travel be discontinued? And why are these taverners and shop-keepers not entitled to indemnity?

[6.] It is true, that charters may be granted with peculiar privileges, and such grants are often deemed necessary to the promotion of public enterprises, which might not otherwise have been undertaken, and which might have been delayed to a much later period. But whenever, owing to a change in the population, business, and intercourse of the country, the public interest requires the opening of new avenues, *within the limits even of such exclusive grants, even chartered rights, as well as individual, must yield and become subservient to the public good, provided, just compensation be made.*

It is further argued, that the power to take by eminent domain, cannot be transferred to any subordinate agent, but must be ex-

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exercised by the State itself. That each individual exercise of the power must be by a legislative act.

I find, upon examination, that this identical objection was raised in *Backus vs. Lebanon*, 11 *New Hampshire, Rep.* 19; and it is thus met and disposed of by Ch. J. Parker: "No authority is cited in support of this proposition, and it is certainly in conflict with the practice of this government from its first institution, and it is believed with that of all others of the United States. It would require very strong reasons to authorize us to break in and condemn this continued practice of two centuries; but none have been suggested, and none present themselves to us. If the power of eminent domain is exercised, through the action of general laws and judicial tribunals, there is probably quite as little danger to be apprehended from its abuse, as in any other mode which can be devised."

A provision authorizing the Inferior Court to exercise a jurisdiction for this purpose, was enacted more than a half century since, and has been acted upon and tried without any question respecting its constitutionality, up to the present time, and with the learned Judge above, we can only say, that no sufficient reasons present themselves to us, for negating this power.

But the plaintiffs claim protection, under the contract entered into with the Inferior Court of Floyd County. What was that agreement? That in consideration of the removal of the County site, from Livingston to Rome, and its permanent location at the latter place, they would do certain things; and among the rest, transport free of toll, the citizens of Floyd County, on foot and on horseback, except such as were going to, and returning from, their plantations. It is admitted that the County site was transferred, and yet this was the only undertaking on the part of the Court. The obligation to transport free of toll, a certain class of the inhabitants, was a burden imposed upon the owners of the ferry, instead of a benefit accruing to them; and it occurs to us as rather singular, that an arrangement to relieve them of this onerous engagement, should be exhibited as a grievance, for which the plaintiffs are entitled to redress. There is, in our opinion, no merit in this view of the case.

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The only other ground upon which the plaintiffs seek relief, is the purpose avowed by the Court, of opening new roads which will divert the line of travel from their bridge. If we are right in the main proposition, then it follows of course, that the plaintiffs have no exclusive property in the public travel. No one is bound to pay toll at their crossing place ; neither is it the duty of the Court to compel them to do so, by hedging them in to this particular route. On the contrary, the Court would be faithless public servants, if they neglected and refused to open up as many highways as the public necessities demanded, and leave it optional with all to pass where they are best accommodated.

It will be perceived that in this discussion, we have placed the case on the most favorable footing for the plaintiffs. We have not questioned the validity of their prescription although its origin is distinctly disclosed in the bill, to have been in 1831. We have treated it as a grant from the State ; our only inquiry upon this head, has been, whether a ferry has, as appurtenant to it, a franchise which excludes injurious competition from the waters above and below. And our conclusion is, that such a grant indicates no such privileges up or down stream—establishes no such undefined, unmeasured, and ever varying rights.

[7.] Again, we have treated the right of pontage, which has been substituted for that of the *ferry*, as though it stood on the same foundation, whereas it is quite apparent, that according to the averments in the bill, the plaintiffs show no prescriptive right to their *bridge*. Was it built in the same place where the old ferry was kept ? If so, then has not the ferry ceased of necessity to exist, as soon as the bridge was erected ? And if the rights which were incident to it, could not be transferred to the bridge, what have become of them ? Are they not extinguished ?

But all these minor matters have been waived in order to ascertain and determine, whether the plaintiffs can sustain the exclusive rights and privileges which they claim. And the present investigation has only served to strengthen the conviction, which we previously entertained, that they cannot. And we feel fully warranted in saying, that this doctrine of an implied grant

would not be sanctioned at this day and in an English Court.
2 *Barn. and Adol.* 793.

Were there any imperative rule of law, binding me to a contrary judgment, I would bow to it; for in the language of another, I feel already the responsibility sufficiently great, of *expounding* laws, without increasing it by *making* them. But while we have adopted the English system of jurisprudence, civil and criminal, it is left to the Courts to determine, whether there be anything in our local situation, or in the nature of our political institutions, which would render any portion of it inapplicable; and would it not be strange for the Courts of this country at this day, to enforce a doctrine which had its origin in the feudal system; a system, justly characterized, as aggregating to itself all privileges, which increased the mass of wealth in the feudal Lords, at the expense of the public? ~~Whoever thinks~~ of applying this notion of special privilege, to mills and markets? And if the doctrine has been abandoned as to these, why insist on constructive franchises in ferries?

No. 95.—JAMES L. MCKNIGHT, plaintiff in error, *vs.* MARTIN KELLETT, defendant in error.

- [1.] In cases of fraud, (except fraud in obtaining a will,) Courts of Equity and Courts of Law have concurrent jurisdiction, and the plea of a ~~total~~ failure of consideration to an action upon a contract under seal, on the ground of *fraud*, will be allowed in a Court of Law.
- [2.] When the vendee purchased a tract of land of the vendor, took a deed of conveyance, went into the possession thereof, and continued in possession: *Held*, that in a suit upon the bond executed by the vendee, under his hand and seal, for the purchase money, he could not, according to the provisions of the Act of 1836, plead a *partial* failure of the consideration of the contract, upon the ground of the fraudulent representations of the vendor; that Act prohibiting the plea of a *partial* failure of consideration in cases in which a *total* failure of consideration could not be pleaded.

McKnight *vs.* Kellett.

Debt, in Chattooga Superior Court. Tried before Judge HOOPER, October Term, 1850.

This was an action brought by Kellett against McKnight, on a bond for the sum of \$3260, with interest. Defendant pleaded that the bond was given for a tract of land, sold to him by plaintiff, and that the consideration for which the same was given had partially failed, in this: that plaintiff had fraudulently represented the land to be a healthy residence, whereby he was induced to purchase it, and that it had proved exceedingly unhealthy; that his family had suffered much by sickness since he resided on the place, and several of them had died; for which reasons he resisted payment of the purchase money, or a portion thereof. It appeared in evidence, that there was a mill-pond near the land, and many witnesses testified to the unhealthiness of the place. There was evidence on both sides as to the representations of the vendor.

Defendant requested the Court to charge the Jury, that the Statutes of the State in regard to the abatement of nuisances had nothing to do with the question; which the Court refused, but charged, that although the Statutes in question could not justify misrepresentation, yet the Jury might consider them, in judging of the value of the place as a residence.

The Court also charged that the vendor of the land was not bound to disclose latent defects.

The Jury found for the plaintiff the full amount of the bond, deducting some small payments. Whereupon defendant moved ~~a new trial~~, on the ground of error in the charge of the Court, on the points above mentioned, and on the further ground that the verdict was contrary to the evidence.

The Court refused the motion, to which decision defendant excepted.

AKIN and ALEXANDER, for the plaintiff in error.

UNDERWOOD and CROOK, for defendant in error.

By the Court.—WARNER J. delivering the opinion.

That the Court erred in its charge to the Jury, we entertain no doubt; indeed, the counsel for the defendant in error concede that point in their argument, but insist, inasmuch as it appears on the face of the record, that the instrument sued on is under the hand and seal of the party, the defence cannot be allowed in a Court of Law. Whether failure of consideration can be pleaded to an instrument under seal in a Court of Law, in the absence of all *fraud*, we express no opinion; but we do hold, that the seal does not preclude an inquiry into the consideration, when it is alleged to be illegal or *fraudulent*.

[1.] In cases of fraud, (with the exception of fraud in obtaining a will,) Courts of Equity and Courts of Law have concurrent jurisdiction. *Tripp & Slade vs. Lowe's Adm'r*, 2 Kelly, 305, and cases there cited. In this case, however, the defendant does not plead a *total* failure of consideration, on account of the fraudulent representations of the vendor, but only a *partial* failure of the consideration for which the bond was executed. The defendant obligated himself to pay thirty-two hundred and sixty dollars to the plaintiff for a plantation, took a deed of conveyance from the plaintiff, went into possession, and still continues in possession thereof, but insists that the consideration has *partially* failed, because the plaintiff falsely and fraudulently represented the plantation to be a healthy location, when it was not healthy, which was well known to the plaintiff, and in consequence of its unhealthiness is not worth more than fifteen hundred dollars. The question is, can this defence be allowed upon the state of facts presented by this record?

[2.] By the Act of 26th December, 1836, the plea of *partial* failure of consideration, cannot be made available only in such cases, under such circumstances, and between such parties as would then admit and allow the plea of a *total* failure of consideration. *Prince*, 475. In the sale of a tract of land of which the purchaser has gone into possession under a deed of conveyance from the vendor, and there is no question as to the validity of

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the title, it is difficult to perceive how there can be a *total* failure of the consideration. If the land is not worth as much as the vendor fraudulently represented it to be, still it is worth something, and in this case the plea of the defendant admits the land purchased to have been worth fifteen hundred dollars. Inasmuch, therefore, as the defendant could not have pleaded a *total* failure of consideration to the suit on this contract, he cannot plead a *partial* failure of consideration, and the judgment of the Court below must be affirmed.

No. 96.—JACOB YANCY, plaintiff in error, vs. EZEKIEL HARRIS, defendant in error.

[1.] Upon a return to a writ of *habeas corpus*, it appeared that the petitioner had been brought before the Inferior Court as a *free person of color*, upon a charge of having violated the Registry Laws, and upon a plea of guilty, was sentenced to pay a fine of one hundred dollars, and in default of payment to be hired out until paid, and that the respondent had hired him in pursuance of the judgment of the Court: *Held*, that he was detained according to law, in pursuance of a judgment of a Court of competent jurisdiction, and that this Court could not enter into the question whether he was or was not a free white person.

Habeas Corpus, from Forsyth County. Decision by Judge JOHN H. LUMPKIN.

This was a writ or *habeas corpus* sued out by Jacob Yancy, alleging that he was illegally confined by Ezekiel Harris, the defendant. In his answer, defendant returned that the plaintiff had been brought before the Inferior Court of Forsyth County, as a *free person of color*, charged with violating the laws of the State on the subject of registration of such persons; that plaintiff has pleaded guilty to that charge, and had been sentenced to pay a fine of one hundred dollars, and in default thereof had been

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hired, by order of the Court, to defendant, by virtue of which he held plaintiff in custody.

On the hearing of the *habeas corpus*, it was admitted that plaintiff was of dark complexion; that he was the son of a white woman, and that after he was fourteen years of age, but before he was twenty-one, he had applied to the Inferior Court of said County to have a guardian appointed for him, as a free person of color, and had applied to the Clerk to be registered as such.

Plaintiff contended that, as the child of a white woman, he was presumed to be a white person until found otherwise by two Juries, as provided by law. The facts stated in defendant's answer were not denied.

The Court refused the application, and remanded plaintiff into the custody of defendant; to which decision plaintiff excepted.

No one appearing for the defendant in error, the plaintiff was allowed to proceed, *ex parte*.

W. H. UNDERWOOD, for plaintiff in error.

By the Court.—NISBET, J. delivering the opinion.

[1.] The return to the writ of *habeas corpus* shows that Jacob Yancy had been brought before the Inferior Court as a free person of color, upon a charge of having violated the Registry Laws, and upon a plea of guilty, was sentenced to pay a fine of one hundred dollars, and being unable to pay, was, in pursuance of the Statute, hired to the respondent.

Upon the hearing, it was conceded by agreement of parties, that he was a dark colored person, and the son of a free white woman, &c. Upon these facts, his counsel assumed that, being the son of a free woman, he followed the condition of his mother as to civil rights, and was from that fact to be held and taken as a citizen, until the contrary was made to appear by two concurring verdicts of a Jury, as provided by our Statute Law. The Court overruled this position of counsel, and remanded Jacob Yancy to the custody of the respondent. We do not find

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ourselves at liberty to enter upon this question. The return to the writ shows that his detention is legal. The Inferior Court had jurisdiction of the person and subject matter, and adjudged him a free person of color, and farther adjudged him guilty of a violation of the Registry Laws, and his detention is the penalty inflicted by the Court for that violation, and which is prescribed by law. *Prince*, 796, '97, 810.

In the trial of the cause, it does not appear to us that the Inferior Court either exceeded their jurisdiction or acted without jurisdiction. Their judgment is a valid, subsisting judgment—if irregular in any particular, it can be set aside, and until that is done, we have no power to discharge the petitioner. The question made by his counsel might have been made before the Inferior Court, and might have been thence brought, by the usual course, before this Court, but it was not made.

Let the judgment be affirmed.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MILLEDGEVILLE,
MAY TERM, 1851.

Present—JOSEPH H. LUMPKIN, }
 HIRAM WARNER, } Judges.
 EUGENIUS A. NISBET, }

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**No. 97.—JOHN W. CARTER and Wife, plaintiffs in error, vs.**  
**GEORGE F. BUCHANAN, defendant.\***

- [1.] Hearsay evidence, admissible to prove birth and pedigree, but incompetent to create or destroy title to property.
- [2.] Where a family of slaves is held by a common title, adverse possession as to one is good as to all.
- [3.] Whether a father permit property to go home with his daughter, immediately upon her marriage or at any subsequent period, if he suffer it to remain there for a number of years, the presumption of law is that he intended it as a gift.
- [4.] Where the law has been fully and fairly submitted to the Jury by the Judge, in his summing up in conclusion, and the Court is satisfied ~~that~~ the verdict is in accordance both with the law and justice of the case, a new trial will not be awarded on account of some inaccuracy of language as to the rights of the parties, which may have been used by the Judge during the progress of the trial.

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\*See former decision upon this case, in 2 *Kelly*, 337.—[Rxp.]

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Carter and Wife vs Buchanan.

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Trover, in Wilkes Superior Court. Tried before Judge BAXTER, September Term, 1850.

The errors assigned in this case arose upon the trial of an action of trover for a slave named Jerry. Carter and wife claimed under an alleged parol gift of Jenny, the mother of Jerry, to Esther Caroline Carter, (formerly Kendrick,) when an infant, by her grandfather, Jacob Bull. Jenny and her offspring had been in the possession of Jones Kendrick, the father of Mrs. Carter, from the time of the alleged gift in 1814, until his death, thirty-five years thereafter. The plaintiffs were married in 1830. This suit was commenced in 1846. The defendant claimed under a purchase at the sale by the executors of Jones Kendrick.

On the trial, the plaintiffs proposed to prove by T. F. Kendrick, that "Jenny was always recognized in the family of said Jones as the property of said Esther Caroline." The Court rejected the evidence, and this is the first error assigned.

Plaintiffs objected to the testimony of the same witness, to the following effect, viz: "Said Jones Kendrick did give Charles Simpson, one of the descendants of Jenny, Rachel by name, shortly after Simpson's marriage with said Jones' daughter, which fact was known to both Carter and wife. This was fifteen years ago." The Court overruled the objection, and this is assigned as error.

Plaintiffs' counsel requested the Court to charge, among other things, "That the gift of one or more of Jenny's children to Simpson, did not cause the Statute of Limitations to commence running in favor of Jones Kendrick as to Jenny and her children not given." The Court refused so to charge, but on the contrary charged, "That the giving away of one of Jenny's children, was notice to Carter and wife, (when brought home to them,) of adverse possession as to the whole of them, and that if Carter and wife knew of the gift, four years before the commencement of the suit, they are barred by the Statute of Limitations." Which charge and refusal to charge are assigned as error.

Plaintiffs' counsel requested the Court to charge, "That the

negro Jenny, going home with Kendrick ten or twelve years after his marriage with the daughter of Jacob Bull, was at too late a day to make it a gift to him."

The Court declined so to charge, but charged, "That if a father-in-law sent home a slave with a son-in-law twelve years after the marriage, it was as high evidence of a gift as if sent home immediately after the marriage." Which charge and refusal to charge are assigned as error.

In the course of his charge, the Court charged the Jury, "That the delivery of property by a father-in-law to a son-in-law at any time, is presumptive evidence of a gift, especially as to third persons." Also, that "When one person is in possession of property for another, the possession does not become adverse until he sets up title in himself, and gives notice of such claim, or exercises acts of ownership inconsistent with the other's title—such as giving them away or selling them—and the plaintiffs had knowledge, by positive evidence, of such adverse possession."

ANDREWS & GARTRELL, represented by COBB, for plaintiffs in error.

R. TOOMBS and A. H. STEPHENS, for defendant.

*By the Court.*—LUMPKIN, J. delivering the opinion.

[1.] The first error complained of is, the refusal by the Circuit Court to permit evidence to be introduced on the trial, that Jenny, the mother of Jerry, the boy in dispute, was always *recognized* in the family of Jones Kendrick, under whom the defendant claims, as the property of Mrs. Carter, one of the plaintiffs.

Hearsay and reputation are competent to establish certain facts, such as birth and pedigree, but are inadmissible, we apprehend, to create or destroy title. To make this legal testimony against Kendrick, it should have been at least shown that he was privy to these family reports. No attempt was made to charge him with knowledge of these rumors.

[2.] The next error assigned is, in allowing a witness to prove that fifteen years before this suit was brought, Jones Kendrick, with the knowledge of his daughter and her husband, had given away Rachel, one of the descendants of Jenny, to Simpson, his son-in-law. We see no objection to this evidence. It was a tacit acknowledgment on the part of the plaintiffs, that Kendrick had the right to dispose of this family of slaves.

[3.] The Court was requested to charge, that the gift of one or more of Jenny's children to Simpson, did not cause the Statute of Limitations to commence running in favor of Jones Kendrick, to Jenny and her children not given. The presiding Judge refused to give this charge, and on the contrary instructed the Jury, that the giving away of one of Jenny's children, was notice to Carter and wife, when brought home to them, of adverse possession as to the *whole*; and that if the plaintiffs knew of the gift, four years or more before the action was instituted, they were barred by the Statute of Limitations; which refusal and charge are assigned as error.

We are inclined to think, that the charge was not strictly legal, either as asked or given. It was clearly wrong to insist that the gift of one of the slaves held by a common title, was *no evidence* of adverse possession, as to the *residue*; and, on the other hand, it was not perhaps entirely right to rule that it constituted *an absolute bar*. It was a circumstance which, uncontradicted or explained, would authorize a finding against the plaintiffs.

Plaintiffs' counsel requested the Court to charge, that Jenny going home with Kendrick, ten or twelve years after his marriage with the daughter of Jacob Bull, was at too late a day to raise the presumption of a gift; which charge the Court refused to give, and, on the contrary, instructed the Jury, that if a father-in-law sent home a slave with a son-in-law, *twelve years* after the marriage, it was as high evidence of a gift as if delivered immediately after the marriage; and this charge and refusal are made the fourth ground of error.

Ordinarily I should say, that the going home of property immediately after marriage, was higher evidence of an intention to give, than when sent at a later period. This, however, is rather

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Simmons and others *vs.* Rarden and Wife.

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matter of *opinion* than of *law*. And to this proposition there must be, in the nature of the case, many exceptions; as for instance, suppose the match was disapproved and repudiated at the time by the parent, and subsequently, after the lapse of many years, if you please, a reconciliation should take place, and immediately consequent thereon, property was sent home with the daughter—this would be as high evidence of the *quo animo* as if the facts had transpired directly after marriage.

[4.] Conceding, then, that some of the language employed by the learned Judge, during the progress of the trial, was not sufficiently guarded, both as to the *degree* of presumption, arising from the delivery of property to a son-in-law immediately after the marriage, and at a subsequent period, and, also, as it respects the Statute of Limitations, still, by reference to the record, it will be seen that in summing up to the Jury in conclusion, he presented the whole law of the case *fairly*, not to say *favorably*, for the plaintiffs; and being satisfied that the concurrent verdicts which have been rendered for the defendant, are in accordance with the manifest justice as well as the law of the case, we cannot get our consent to reverse the judgment.

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No. 98.—LEAH SIMMONS and others, plaintiffs in error, *vs.* JOHN A. RARDEN and Wife, defendants.

[1.] Verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity.

[2.] Where a bill was filed by John A. Rarden and Henrietta, his wife, formerly Henrietta G. Ogletree, to recover certain slaves in right of the wife; and the Jury on the trial of the case found the following verdict: "We the Jury find and decree, that the complainant, Henrietta G. Rarden, (formerly Henrietta G. Ogletree,) in her own right, and for her own use, do recover of the defendant the negro slaves, Washington, Martha, &c." *Held*, that on a motion in arrest of judgment, on the ground that the verdict did not find in favor of the marriage of the parties, which was denied by the



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Simmons and others vs. Rarden and Wife.

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defendant's answer, that the legal effect of the verdict was in favor of the marriage.

In Equity, in Richmond Superior Court. Decision by Judge STARNES, February, 1851.

John A. Rarden and wife, filed a bill against Leah Simmons and others, to recover certain property belonging to the wife prior to the marriage, and to set aside a deed made by the wife, in contemplation of marriage, and in fraud of the marital rights, and under coercion of defendants. The answer denied the fact of the marriage, as well as the other facts charged. The Jury found the following verdict: "We the Jury find and decree, that the complainant, Henrietta G. Rarden, (formerly Henrietta G. Ogle-tree,) in her own right, and for her own use, do recover of the defendant, the negro slaves, Washington and Martha, (the negro slave Letty, being dead;) and also said complainant recover of the defendant, two hundred and forty dollars, for the hire of the said three slaves, until arrest after commencement of this suit, with costs."

A motion was made in arrest of any judgment upon this verdict, upon the grounds:

1st. Because of the variance between the pleadings and the finding of the Jury, in this: that by the pleading, complainants allege that they are husband and wife, which defendants by their answer deny. The finding being for Henrietta G. alone, is tantamount to finding the truth of the allegation of defendants.

2d. Because of the uncertainty of the finding of the Jury under the issue made by the pleading, in this: that the complainants either are, or are not, husband and wife. If they are, the finding should have been for them jointly as such. If they are not, then there could be no finding for them jointly nor separately.

The Court overruled the motion, holding the verdict to be virtually for the complainants, and covering all the issues submitted. This decision is now assigned as error.

A. H. H. DAWSON, by COBB, for plaintiff in error.

A. J. MILLER, for defendant.

*By the Court.*—WARNER, J. delivering the opinion.

[1.] This was a bill, filed by John A. Rarden and Henrietta G. his wife, formerly Henrietta G. Ogletree, to recover certain slaves in the record mentioned. The answer of the defendant denied the marriage of the complainants. A motion was made to arrest the judgment in the Court below, on the ground, that the Jury had not found in favor of, nor against the marriage of the parties. The rule is, that verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity.

[2.] Can it be reasonably inferred from the verdict in this case, that the Jury found in favor of the marriage? The Jury find and decree, "that the complainant, Henrietta G. Rarden, (formerly Henrietta G. Ogletree,) in her own right, and *for her own use*, do recover of the defendant, the negro slaves, Washington, &c." The property is claimed in the right of the wife, Henrietta G. Rarden, formerly Henrietta G. Ogletree. The Jury find their verdict in favor of Henrietta G. Rarden, *formerly* Henrietta G. Ogletree, *for her own use*. If the Jury had not been satisfied as to the validity of the marriage, why did they find a verdict in favor of Henrietta G. Rarden, *formerly* Henrietta G. Ogletree? If they had believed there was no marriage of the parties, the verdict would have been in favor of Henrietta G. Ogletree. Besides, the Jury not only find their verdict in favor of the complainant, in the name, as claimed by the marriage, but they have employed words, the legal effect of which, is to protect the property from the *marital* rights of her husband. If the Jury had not found in favor of the marriage, we think it is quite clear, the verdict would have been in favor of Henrietta G. Ogletree, without more; and not in favor of Henrietta G. Rarden, *formerly* Henrietta G. Ogletree, in her own right, and *for her own use*. What but the marriage, changed the *former* name of Henrietta G. Ogletree, to

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Wetmore vs. Chavers.

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that of Henrietta G. Rarden? What but the marriage induced the Jury to employ words in their verdict which would secure the property to her separate use, and protect it against the *marital* rights of her husband? In our judgment, the legal intendment of the verdict is in favor of the marriage. Let the judgment of the Court below be affirmed:

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No. 99.—O. & A. WETMORE, plaintiffs in error, vs. JOHN CHAVERS, defendant.

[1.] The brief of the evidence filed on a motion for a new trial, is not a part of the record, to be transmitted to the Supreme Court; and does not dispense with the necessity of incorporating in the bill of exceptions, a brief of the oral and copy of the written evidence.

In error, from Richmond County.

This writ of error, was sued out to a decision on a motion for a new trial, on the ground, that the verdict was contrary to the evidence. The bill of exceptions did not contain a brief of the evidence, or refer to any. In the transcript of the record, the Clerk sent up a brief of evidence, purporting to be of file in his office.

A motion was made to dismiss the writ of error, on the ground that no brief of evidence had been embodied in the bill of exceptions.

J. G. GOULD, for the motion.

JOHN SCHLEY, *contra*.

*By the Court*—NISBET, J. delivering the opinion.

[1.] The motion to dismiss must be sustained. The 4th rule of this Court requires, that a brief of the oral, and a copy of the written evidence in the cause, be embodied in the bill of exceptions. Is there any thing in this case which can authorize an exception to the rule? There is no evidence whatever, in the bill, and no reference to any. The brief of the evidence agreed upon by counsel, upon moving the rule for the new trial below, comes up with the record, and therefore, it is said that the reason of the rule ceases. This would be true if the brief, which is of file below, were a part of the record which it is made the duty of the Clerk to send up. But we do not think that it is. The record which the law requires him to certify to this Court, consists of the pleadings in the case, and the orders, judgments or decrees of the Court rendered in the case, and the verdict of the Jury, if one is rendered. This brief is no more a part of the record, than the interrogatories and depositions which are of file. Moreover, the brief may be sufficient for the Court below, he being a witness to the trial. But we need all the evidence. The evidence need not be in any case, both in the bill and with the record.

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No. 100.—ELLIOTT B. LOYLESS and Wife, plaintiffs in error,  
vs. JOHN A. RHODES and RICHARD B. DAY, executors, &c. of  
A. Rhodes, deceased.

- [1.] The opinion of the Court, in *Mobley et. al. vs. Mobley*, 9 Geo. Rep. 247, referred to and explained.
- [2.] The mode of procuring letters dismissory, by executors and administrators specified.
- [3.] An executor postponing a settlement with one of the legatees, under false pretences, and finally delivering over the entire estate to the other legatees, will not be protected for this mismanagement, by his letters of dismission; it is a fraud, in fact, which will vitiate his discharge.

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Loyless and Wife *vs.* Rhodes and Day.

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In Equity. Decision on demurrer, by Judge STARNES, Richmond Superior Court, February Term, 1851.

Elliott B. Loyless and Nancy, his wife, formerly Nancy B. Rhodes, filed their bill against John A. Rhodes and Richard B. Day, as the executors of the last will of Absalom Rhodes, deceased; alleging, that under the will of said deceased, complainant, Nancy Loyless, was a legatee; that the estate was worth \$30,000, and complainant entitled to one-sixth part thereof; "that after allowing the usual time to elapse for a settlement and payment of all demands against deceased, they applied to the executors and requested to be paid the share of said Nancy. But they (the executors) alleged that there was still a number of unsettled demands, and that some of them were litigated and in suit against them as such executors—declined complying with the request of complainants, and informed them that a considerable length of time would necessarily elapse before they could pay and deliver over complainant's share." "That complainants rested contented with this statement, having full confidence in the executors; and as their circumstances were needy, they removed to Stewart County in this State, and have resided there for several years past; that they frequently, after their removal, applied to said executors by letter, but when they received any reply, it was that the estate was still involved in litigation, and there could be no division among the devisees and legatees." "That in June 1850, very much to their surprise, complainants ascertained that the executors had settled up the estate of the said Absalom, divided the residue among the other legatees, *excluding complainant entirely*; and had procured an order from the Court of Ordinary, dismissing them from their trust, and authorizing letters dismissory to issue to them."

Complainants further charged, "that the said order was irregular, fraudulent and void, for the following reasons, viz: The said executors did *not fully discharge their duties* before they applied for letters dismissory; they presented *no petition* to said Court, praying a discharge; there was *no order* of said Court at *January Term, 1849*, authorizing citation to issue; that no such

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Loyless and Wife vs. Rhodes and Day.

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citation was duly or legally published; that *no examination into the situation of the testator's affairs and estate*, was made by said Court, and that said estate never has been fully and legally administered; all which was occasioned by the irregular and negligent proceedings in said Court, and by the improper conduct, artifice and fraud of the said executors, entirely without the knowledge of complainants, and intended by said executors to deprive complainant of her legacy." Prayer that the order of dismissal may be declared null and void, and for an account.

The following was the order of dismissal referred to:

"Upon the application of John A. Rhodes and Richard B. Day, executors of the last will and testament of Absalom Rhodes, deceased, for letters dismissory, they having filed their petition at the January Term, 1849, of the Court of Ordinary, and citation having been duly issued and published, as is in evidence to the Court; and no cause being shown, or objections filed in the office of the Clerk of this Court to the contrary; and it appearing to the Court that they have faithfully and honestly discharged the trust and confidence reposed in them and that they have fully administered on said estate: *Ordered*, That they be and are hereby released, discharged and dismissed from their liability, as executors on the said estate, and that letters dismissory be issued to them accordingly.

On demurrer to this bill, for want of equity, the Court overruled the demurrer, and this decision is brought up for review.

JOHN SCHLEY, for plaintiffs in error.

A. J. MILLER and TOOMBS, for defendants.

*By the Court.*—LUMPKIN, J. delivering the opinion.

[1.] Before proceeding to the decision of this case, I will take occasion to state, that according to the report of *Mobley and others vs. Mobley*, 9 Geo. Rep. 267, as it now stands, this Court is made to hold, that the order of a Court of Ordinary, dismissing the representative of an estate, is valid and sufficient, ~~at~~

though the facts do not appear of record, which are necessary under the law, to give that tribunal jurisdiction.

The judgment of the Court of Ordinary of Appling County, was attacked on two grounds: 1st. Because Jesse Mobley, the administrator of his father, had committed fraud in fact; and 2dly. because there was no evidence in the records of the Court of Ordinary, that application for letters dismissory had been made, and a citation issued and published in terms of the Statute. The Circuit Judge overruled both objections—a writ of error was sued out, and upon the hearing, we agreed to restrict our judgment to the *first point*, and to waive the consideration of the *second* question, until it should be more fully and satisfactorily discussed, as we had previously done, for the same reason, in *Worthey et. al. vs. Johnson et. al.* 8 Geo. Rep. 236.

[2.] Before dismissing this matter, I would suggest, that for the purpose of making an order of discharge available as a protection to the party, there should be *record evidence* that a petition has been presented, setting forth that the executor or administrator has fully discharged the duties assigned to him, and praying to be released from his executorship or administration; that an order was passed by the Court of Ordinary for a citation to be issued, requiring all persons concerned to show cause, if any they have, why the said executor or administrator, *on the day therein to be named*, should not be discharged; that said citation has issued and been published in one or more gazettes of this State, for the space of six months; that no cause was shown against the application, or if objections were filed, that they were overruled; and that it appeared from an examination into the situation of the testator's affairs and estate, that the petitioner had faithfully and honestly discharged the trust and confidence reposed in him. And it would be well for the order of discharge to recite on its face all these facts.

I do not say, for I am not authorized or prepared to do so, that no one can be dismissed from his liability, without a rigid compliance, in so many words, with each and all of these formularies; I will say, however, that it is safer altogether to observe them. By doing so, it places the judgment of the Ordinary up-

on the same footing with that of any other Court; whereas by neglecting to have the initiatory steps, necessary to give it jurisdiction, spread on its records, its judgment might be treated as a nullity; especially, where it is interposed as in the present case, as a bar to a full and fair investigation of the trustees' actings and doings upon the estate.

[3.] We think the decision of the Superior Court, overruling the demurrer, and sustaining the bill, ought to be affirmed, for the reason that the statement in the bill constitutes a case of actual fraud.

It is alleged that the complainants are legatees of Absalom Rhodes, deceased, and entitled to one-sixth part of his estate; that as such, they repeatedly applied to the defendants, who are the executors, for a settlement of their share; that they were put off upon the pretext, that there were a number of unadjusted claims against the testator, some of which were in litigation; and that on that account, a considerable time must necessarily elapse, before they could pay and deliver over their part; that content with this representation, and having full confidence in the executors, they removed from Richmond to Stewart County, where they have resided for several years past; that since their removal, they have frequently applied by letter, for a settlement, and they were still postponed under the same pretence, namely: that the estate was involved in law suits, and in consequence thereof, there could be no division; that in June, 1850, very much to their surprise, they ascertained that the defendants had distributed the whole estate among the other legatees, excluding them entirely from any participation in the property; and that by fraud and artifice, notwithstanding this mismanagement, and without the knowledge of the complainants, they had procured an order of discharge, for the purpose of depriving them of their legacy. I ask, would the Ordinary—would any honest Court, have granted this dismissal, with a knowledge of the facts charged in the bill? Unquestionably not. We are bound to believe that the Court was imposed on, or else it never would have sanctioned the wilful appropriation of this estate to five only of the six legatees to whom it belonged. Had the di-



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Holt and others vs. The Bank of Augusta and others.

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vision been made in ignorance of the fact, the case would have been very different. As it is, we can view it in no other light, than a fraud upon the rights of the complainants. Our opinion, therefore is, that the bill should be answered, and an inquiry had into the alleged misconduct of the executors.

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No. 101.—ASA HOLT and others, plaintiffs in error, vs. THE BANK OF AUGUSTA and others, defendants in error.

[1.] Although it is a general rule in Chancery practice, that on the coming in of the answer, plainly and distinctly denying all the facts and circumstances upon which the equity of the bill is based, that the Court will dissolve an injunction; yet, in some particular cases, the Court will continue the injunction, although the defendant has fully answered the equity set up. The granting and continuing of the process must always rest in sound discretion, to be governed by the nature of the case.

Motion to dissolve injunction, in Richmond Superior Court. Decision by Judge STARNES, January Term, 1851.

In 1849, Asa Holt filed his bill in Equity against Joseph Davis, as the administrator of Thomas Davis, deceased, and the Bank of the State of Georgia, alleging that in October, 1848, he gave to Thomas Davis, then in life, a letter of credit, authorizing him to draw on said Holt, for the sum of five thousand dollars, upon the promise of said Davis to invest the proceeds of the same in cotton, and ship the cotton to said Holt, (who is a commission merchant in Savannah,) who was to have the control of the cotton, and dispose of the same to meet the said draft; that Thomas Davis negotiated this draft, at the Branch Bank of the State of Georgia at Augusta, for \$5000, which sum was placed to the credit of said Davis; that very shortly thereafter, on 14th October, 1848, Thomas Davis died suddenly, leaving \$3,240 39, of the net proceeds of the draft to his credit

in said bank—the same never having been drawn out; that Davis, by his sudden death, was prevented from purchasing and forwarding the cotton as promised; that the draft had been protested for non-payment, and returned to the Branch Bank at Augusta, and that the estate of Davis was insolvent. The prayer was for an injunction restraining the bank from paying out the sum aforesaid, and a decree that the same be applied to the payment of the said draft, as far as the same will go.

Joseph Davis, the administrator, by his answer admitted, that the facts charged were true, as he believed, and did not contest them, but insisted that such judgment and decree as should be made in the premises, should be conformable to law, and as far as practicable, promote the interest of other creditors.

In April, 1850, the Bank of Augusta and other creditors of Thomas Davis, filed their bill, charging that Joseph Davis, the administrator, combined and confederated with Asa Holt, to give him an undue preference; that under this agreement, the bill above specified was filed, and the answer made, admitting the facts; that the administrator and Holt had agreed to indemnify the Bank of the State, so that that corporation became an indifferent stakeholder; that the bill had been kept out of office, so that the parties could not sooner get sight of it, and that the estate of Thomas Davis was insolvent.

The prayer was for an injunction to restrain Holt from prosecuting his bill, until the rights of the other creditors could be ascertained, and that the fund on deposit in the Bank of the State should be paid over to the administrator, to be distributed according to law, and for other and general relief.

The defendants, by their answers, denied all fraudulent confederacy and combination, and all attempts at concealment.

On the coming in of the answers, a motion was made to dissolve the injunction, on the ground the equity of the bill was sworn off.

The Court, after hearing argument, refused to dissolve the injunction, and this decision is assigned as error.

JOHN SCHLEY, for plaintiffs in error.

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Holt and others *vs.* the Bank of Augusta and others.

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J. G. GOULD, for defendants in error.

*By the Court.*—WARNER, J. delivering the opinion.

[1.] The equity of the complainants' bill rests upon two grounds: First, the collusion between Holt and the administrator of Thomas Davis; second, that the creditors of Thomas Davis, deceased, cannot be parties to the bill filed by Holt against Joseph Davis, the administrator, to have the money remaining to his credit in bank, paid over to his demand, as the accommodation acceptor of Thomas Davis, which, in view of the *peculiar* character of Joseph Davis' answer, it is important for the protection of their rights as creditors, that they should be heard. The answer, it is true, denies all collusion, yet the fact stands out prominently on the face of the record, that Joseph Davis, the administrator, manifests a *strong bias* in favor of Holt, the complainant, in the original bill. It is said that the Court, on the trial of the last named bill, will be bound to protect the rights of all the creditors; but we think their rights will be much *better* protected when they have an opportunity of being heard before the Court, than they would on the trial of Holt's bill against Davis, when they could not be heard. Although it is a general rule, that on the coming in of the answer, *plainly and distinctly denying all the facts and circumstances* upon which the equity of the bill is based, the Court will dissolve the injunction; yet, in some particular cases, the Court will continue the injunction, though the defendant has fully answered the equity set up. The granting and continuing of the process must always rest in sound discretion, to be governed by the nature of the case. *Hemphill vs. Ruckersville Bank*, 3 Kelly, 445, and cases there cited. The discretion of the Chancellor in refusing to dissolve the injunction in this case was, in our judgment, properly exercised, for the very satisfactory reasons which he has given in his opinion accompanying the record before us.

Let the judgment of the Court below be affirmed.

No. 102.—WILLIAM NEAL, plaintiff in error, vs. NANCY FARMER, defendant.

- [1.] In cases of felony, the civil remedy is suspended until the offender is prosecuted to conviction or acquittal.
- [2.] African slavery held never to have existed in the Island of Great Britain by the Common Law, by Statute, or by the Laws of Nations.
- [3.] The Law of Villenage obsolete in England. Quere?
- [4.] If not obsolete, but of force in 1732, when the colony of Georgia was settled: *Held*, that it had no application to African slavery in England or in Georgia.
- [5.] The Common Law of England held to be inapplicable to the institution of slavery, except to protect the rights of masters.
- [6.] The slave trade held to be recognized as a lawful commerce, under the Law of Nations, and that law obligatory upon the States of the world, unless repudiated by treaty or positive law.
- [7.] *Held*, that by the comity of nations; when a slave escapes into, or is found within the jurisdiction of a State where slavery is not recognized, it is the duty of that State, upon the demand of his rightful owner, to deliver him to be taken back to the State where, by law, he is a slave.
- [8.] The origin and character of property in slaves in this State defined.
- [9.] It is not felony in Georgia, by the Common Law, to kill a slave, and the only legal restraint upon the power of the master over the person of the slave in Georgia, is such as is imposed by Statute.

Trespass, &c. in Greene Superior Court. Tried before Judge JOHNSON, March Term, 1851.

This was an action brought by Nancy Farmer against William Neal, to recover damages for the killing of a negro slave, the property of Mrs. Farmer. On the trial, the plaintiff proved the killing and closed. The defendant introduced no testimony. The Jury found a verdict for plaintiff for \$825.

The defendant then moved for a new trial, on the following grounds, among others:

1. That the Jury found for the plaintiff, when there was no evidence that the plaintiff had prosecuted the defendant either to conviction or acquittal for the killing.

2. That the Court erred in omitting to charge the Jury on the

point of law stated in the above ground, when defendant's counsel had distinctly stated the point in his argument to the Jury, and insisted upon the same in bar of the plaintiff's right to recover, though the counsel did not ask the Court to charge upon the said point in writing.

The Court refused to grant the new trial, upon the ground that the killing of a slave was not a felony at Common Law, and that it was not necessary for plaintiff to prosecute the offender criminally, before commencing her civil action. On this decision error has been assigned.

JAMES A. MERIWETHER, for plaintiff in error.

The first question to be considered is, whether the trespass alleged to have been committed by Neal, was such an act as that plaintiff's right of action in relation thereto was suspended until defendant had been prosecuted to conviction or acquittal. In all cases of felony at Common Law, the right of plaintiff to sue for damages is suspended until he prosecutes the defendant to conviction or acquittal. 5 Ga. Rep. 404.

Two points are to be considered. 1st. Was the killing of the slave murder? 2d. Is the murdering of a slave felony at Common Law?

1st. The killing of a human being is presumed to have been maliciously done, and this presumption must be rebutted by proof of facts, reducing the offence from murder to manslaughter or justifiable homicide.

2d. The murder of a slave is felony at Common Law. See *definition of murder*, 1 East's Cr. Law, 214.

The killing of *any person* "in the peace of the King," was murder, and it was felony without benefit of clergy. This principle applied to England and her colonies.

Having shown that the murder of *any person* was *felony*, and slaves being persons, it is for those who claim the *right* to take the life of a slave, to show the law which creates an exemption in their favor.

The master had no power over the life of his slave by the

**Common Law.** It has been refused to him since the birth of Christ. *Cooper's Justinian*, 411.

Pure slavery, that which gives the owner a right over the life of his slave, never did exist in England or any of the American colonies. 1 *Blk. Com.* 423.

Trover was said not to lie, because the owner had not such an absolute property in his negro that he might kill him. *Cooper's Justinian*, 414, citing *Salk.* 666. *Ld. Ray.* 1274.

If a master corrects his servant with a bar of iron, or strikes him with a sword, and so kills him, it is murder. 2 *Coventry & Hughes*, 958. *Gray's Case*, 64, 133. *Kent's Case*, *Skin.* 668.

These cases show that the right to take the life of a slave never belonged to a master, either in England or the Colonies. The murder of a slave was, therefore, felony.

The Act of 1770, (Georgia Legislature,) mitigated the severity of the punishment, but made it felony to kill a slave. *Watkins' Digest*, 178.

But were there persons in England known as slaves, *who were in the power of the King?*

We reply, that slavery existed in England, as it did in Georgia, up to the year 1772, the period of the trial of Sommerset, (the negro,) *practically and legally* ever since.

Slavery existed by the Common Law of Nations, as well as by the Civil Law, and, consequently, went into any nation where not prohibited by Statute. *Cooper's Justinian*, p. 11, §§1, 2, 3, 4.

It existed in England before the Norman conquest, and African slavery was there so late as 1772.

It existed before the Norman conquest, and the slaves were represented by their master, as our slaves are now. *See History Anglo Saxon Race*, vol. 1, pp. 292, 337.

This condition continued after the conquest, giving the master the same power of sale, the same right to his labor, &c. 2 *Bl. Com.* 92, 93, 94.

These conditions were established by the Law of Nations. *Cooper's Justinian*, p. 254, §§1, 2, 3, 4, and pp. 16, 17, §§1, 3.

Slaves are held upon the same terms in Georgia at this time.

Villeins were nearly all manumitted by the influence of the

Clergy, except those they held themselves. *Cooper's Justinian*, 414.

In 1562, England began the African slave trade, and introduced African slaves in place of white slaves. 1 *Bancroft's History U. S.* 173. 11 *Am. Encyclopedia*, 433, '34.

The slave trade exists by the Law of Nations. 5 *Eng. Com. Law Rep.* 315.

Trover will lie for a negro slave. It is as much property as any other thing. 1 *Ambler*, 76. See *Lord Stowell's Decision*, 1827.

In 1670, the Royal African Company was chartered by Queen Elizabeth, to deal in slaves.

Thus slavery came into the Colonies and into England, both by the Common and Statute Law.

African slavery continued to exist in England, practically, until 1772. See 11 *Am. Encyclopedia*, 351. 20 *State Trials*, 63.

That decision turned loose many slaves in England, which caused the establishment of the Colony of Sierra Leone. *Ib.* 398.

F. H. CONE, for defendant in error.

Counsel for defendant in error submits the following points and authorities:

1st. This Court will not grant a new trial, on the ground that the verdict was contrary to evidence, when it has been refused by the Circuit Judge, if there is any evidence to support the verdict. *Peck vs. Lane*, 2 *Kelly*, 15. *Roberts vs. State*, 3 *Kelly*, 322. *Armistead vs. Barker*, 4 *Kelly*, 170. *Craft vs. Jackson*, *Ib.* 360. *Garland vs. Millan*, 6 *Ga. Rep.* 310. *Stroud vs. Mays*, 7 *Ib.* 269. *Killan vs. Sistrunk et ux.* 7 *Ib.* 283.

2d. A new trial should not be granted where the party has had a fair trial upon the merits of his case, and justice has been done. *Goode vs. Love's Adm'rs*, 4 *Leigh*, 635.

3d. Killing a slave is not felony at Common Law, and, therefore, there was no necessity of alleging and proving that the defendant had been prosecuted for the offence of killing a slave,

the subject matter of the action. 1 *Coke's Ins.* 487, note g. *Ib.* 403. *Forbes vs. Cochran*, 2 *B. & Cres.* 448. *Rees' Cyclopaedia*, vol. 34, tit. *Slave*. *State vs. Boone*, *Taylor's Rep.* 246. *State vs. Mann*, 2 *Dev. Law*, 263. *Fable vs. Brown*, 2 *Hill's Ch.* 389. *Jackson vs. Lary*, 5 *Cowen*, 397. 20 *State Trials*, 1 *Somerset's Case*. 4 *Bla. Com.* 151. *Watkins' Dig.* 178. *Prince's Dig.* 913. *Ib.* 656. *Bible*—*Exodus*, c. 21, vs. 12, 20, 21: *Numb.* c. 35, v. 17: *Lev.* c. 24, v. 17: *Deut.* c. 25, vs. 44, 45, 46.

3d. Even admitting that such allegation and proof were necessary, yet, after verdict, it is not competent for defendant to move for a new trial, on the ground that the Court did not charge the Jury, that such proof was necessary, when the defendant did not request the Court to make such charge—the mere failure of the Court to charge upon a point upon which the Court is not requested to charge, not being a ground of error. *Simpson vs. Blount*, 3 *Dev. Law*, 34. *Culbreath vs. Gracy*, 1 *Wash. C. C. Rep.* 198. *Bolan vs. Peeples*, 1 *Brevard*, 109.

*By the Court.*—NISBET, J. delivering the opinion.

The rule for a new trial in the Court below, was based upon the grounds that the killing of a slave is a felony at Common Law, and that in all cases of felonies, the civil remedy is suspended until the offender is prosecuted to conviction or acquittal. The reply of the plaintiff was, that it is not a felony at Common Law to kill a slave. The presiding Judge held with the plaintiff, and his opinion on this point is excepted to.

[1.] In *Adams vs. Barrett*, this Court held, that in Georgia, in cases of treason and of such crimes as are felonies by the Common Law, the person injured is not entitled to his action, until the offender is prosecuted to a conviction or acquittal. 5 *Ga. Rep.* 404. This was no *obiter*, as the Circuit Judge seemed to think. It is true, that the case might have been decided without an opinion upon this question, yet it was made in the bill of exceptions, solemnly argued, a judgment invoked and rendered. We consider it settled in that case, and shall not now open it. It is assumed by the plaintiff in error, that the settlers of the



Colony of Georgia brought with them the Common Law of Great Britain, so far as it was applicable to their condition, and that by that law, as it stood in England in 1732, when the Colony of Georgia was settled, and as it was held throughout our entire colonial history, and is still held in Georgia, it is felony for a white man to kill a slave. The first of these assumptions is not controverted. It is not at all questionable that the Common Law, so far as it was applicable to the condition of such a community, was of force in the Colony of Georgia, and so continued until modified by the Acts of the Colonial Legislature, after that was organized in 1751. *Stephens' History of Georgia*, 216 to 220, 247, '48.

It being farther conceded, that after the organization of the State Government, the Common Law was adopted by an Act of the Legislature, so far as it was not contrary to the Constitution, laws and form of government of the State of Georgia, the question becomes this simply, to wit: Is it a felony at Common Law to kill a slave? It is a question of great interest and gravity, and if we err in our judgment upon it, it affords me real pleasure to say, that it will not be for the want of such instruction as may be derived from the ablest and most satisfactory argument. We are pleased to record our sense of the value of the discussion which this cause has elicited at the hands of the counsel, Messrs. Cone and Meriwether. The farther propositions of the counsel for the plaintiff in error, who was defendant below, are that slavery of like character with African slavery, as it exists in this country, existed in *England* from the earliest periods of the history of that State—for example, among the *Saxons* before the conquest, and after the conquest also, in the form of villenage; that the killing of a slave under the *Saxon* sway was a felony, and the killing of a villein under the Common Law was also a felony. From these two propositions he deduces the conclusion, that the killing of a negro held in servitude in England, whether primarily introduced there as a slave from Africa, or coming into England from her own Colonies or other States where slavery is recognized, would be also a felony. Hence, also, the additional inference, that if a felony by the Common Law in Eng-

land, it was equally a felony in the Colony of Georgia, where that law was of force after the introduction of slavery, about the year 1749. *Stephens' History of Georgia*, 285 to 312.

That African slavery existed, in fact, in England, as late as 1772, under the sanction of the Laws of Nations, and Acts of the British Parliament, which authorized the slave trade with her Colonies, and was recognized by the decisions of the highest Courts in that country; that the negro there occupied the same position as a slave, that he occupied as such in the Colony; that in England, notwithstanding this *status*, his life was under the protection of the Common Law, and it was a felony to kill him; and if so, equally a felony to kill him in the Colony of Georgia.

[2.] Pure slavery—slavery as unconditional as the African slavery of this day—existed under the Saxon Government. “Under the Saxon Government,” says *Blackstone*, “there were a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they and their children and effects, to the lord of the soil, like the rest of the cattle or stock upon it.” 2 *Blk. Com.* 92, 93. *Temple's Introd. His. of Eng.* 59. *Turner's Hist. Anglo Saxon Race*, pp. 292, 337. It originated, no doubt, by captivity in war, and sprung out of the wars between the Britons and Saxons, between the Danes and the Saxons, and among the different States of the *Heptarchy*. What was the condition of the slaves of that early day—what the limitations upon the rights of the master, it is difficult to determine. There is no reason, however, to believe but that *Blackstone* gives a true account of the matter. Property in the bondsman, was as absolute as in cattle or other stock. I do not question but that it was as absolute as that which exists at this time among the tribes and chieftains of Africa. However analagous the slavery of the Saxon age, to the African slavery of the Colony of Georgia, anterior to any legislation upon the subject, I consider that it can have no bearing upon the question before me. It became extinct early after the conquest. It was rapidly, after that event, merged in the institution of villenage, and its distinctive features lost. It existed anterior to the

Common Law; for however that system of laws may, to some extent, be traced to the times before the Norman conquest, yet it is certainly true, that as a defined, intelligible system, it had no existence before that epoch of English history. According to *Macaulay*, indeed, it rose to the dignity of a science not until *Magna Charta*. 1 *Macaulay's Hist. of Eng.* 16. We look in vain, certainly, to the Common Law for traces of Saxon slavery, as an institution under its protection. The English constitution can scarcely be said to have assumed its first great outlines, until the fusion of the Britons, Saxons, Danes and Normans into one race—the enterprising, wise and all-conquering people which we are accustomed to designate as the Anglo-Saxon race—to which we trace our original. It is not very profitable for the lawyer, in search of Common Law principles, to undertake the explanation of these Cimmerian regions of British history. It is a region of mists and fogs and darkness. The servitude of those times may shed light upon slavery—may illustrate the character of slavery in its first formations—may serve to confirm that idea of title to, and property in a slave, which we of the Southern States of the American Union at this moment entertain; but I apprehend that a Judge, sitting to determine what was the *status* of the slave under the Common Law, can derive from its consideration no light to guide him, because I consider that the Common Law recognizes but one species of slavery as having existed in England under its sanction at any time, and that is *villenage*. It was stated by Mr. *Hargrave*, in his learned argument in the *Somerset* case, that there was no provision in the laws of England to regulate any slavery, but that of *villenage*, and, therefore, he insisted that no slavery could be lawful in England, except such as would consistently fall under that denomination. This position, and also the inference, seem to have been conceded by the Court and the counsel. Hence, the effort of Mr. *Dunning*, the counsel for Stewart, the owner of *Somerset*, was, among other efforts, to bring his case under the ancient law of the bond villein. 20 *vol. State Trials*, 1.

[3.] So here, Judge Meriwether seeks to do the same thing;

and if it be true, that the *status* of the African slave be the same with that of the feudal villein, and the Law of Villenage was of force, at the settlement of the Colony of Georgia, in England, one of the strongest positions in his argument is gained; because, if the same, it comes under the Law of Villenage, and by that law it was a felony to kill a villein—consequently a felony to kill an African slave. The question, then, which we next encounter in this discussion is, were the laws which recognized the institution of villenage, and protected the life of the villein, a part of the Common Law, when this Colony was settled in 1732?

Lord *Coke* says, that the law favors life, liberty and dower. This favoritism to liberty seems gradually to have operated in the destruction of the bondage of the villein. The “good nature and benevolence of many Lords of manors,” having permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the Common Law, of which custom is the life, gave them title to prescribe against their lords. Hence sprang titles by copy of Court roll, and villeins “sprouted up into copy holders”—their persons being enfranchised by manumission or long acquiescence. They were manumitted expressly or by implication. Expressly, by deed; impliedly, where a lord bound himself by bond to a villein, to pay him a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years. So, also, if a lord brought an action against his villein, this freed him. It seems, too, that the ghostly counsels of the Catholic clergy came in aid of the policy of the law in favor of liberty. Sir *Thomas Smith*, according to *Blackstone*, tells us, that “The Holy Fathers, Monks and Friars, had, in their confessions, and especially in their extreme and deadly sicknesses, convinced the laity how dangerous a practice it was for one christian man to hold another in bondage. So that temporal men, by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said Holy Fathers, (he proceeds,) with the Priors and Abbots, *did not* in like sort by theirs, for they also had a *scruple in conscience* to impoverish and despoil the

church, so much as to manumit such as were bound to their churches, or to the manors which the church had gotten, and so kept their villeins still." This conduct of the Holy Fathers was certainly characteristic. The result of all which, however, was to abolish tenures by villenage and villein bondage; so much so, that when tenure in villenage was abolished by Statute, in the 12th year of the reign of Charles II. there was hardly a pure villein left in the kingdom. According to Lord Mansfield, the last confession of villenage in Court, (which was one of the ways in which men became villeins,) occurred in the time of the sixth Henry.

The institution, very much to the satisfaction of British lawyers, and judges, and statesmen, (although the latter were at the time fostering, by parliamentary enactments, the slave trade to Africa,) became substantially extinct in the latter years of the reign of Elizabeth. The last claim of villenage recorded in the British Courts, is stated to have occurred in the fifteenth of James I. Thus we learn how and when this institution became extinct, and the laws which sanctioned it became, in fact, obsolete. Afterwards, in 1661, in the 12th Charles II. villein tenures were abolished by Act of Parliament. 2 Black. Com. 94, '5, '6, '7. Litt. §§204, '5, '6, 208. Sir Thomas Smith's Commonwealth, b. 3, ch. 10. 1 Noy. 27. 11 Harg. St. Tr. 342. Bac. Abr. tit. Villenage, 66. Brit. cap. 31. Mir. cap. 2, §18. Fitzh. Nat. Br. 78, C. D. Somerset's Case, passim, 20 State Trials, 1.

There were two kinds of villeins—villeins *regardant*, and villeins *in gross*. "A villein *regardant* is, as if a man be seized of a manor, to which a villein is *regardant*, and he which is seized of the manor, or they whose estate he hath in the same manor, have been seized of the villein and his ancestors as villeins and neifs *regardant* to the same manor, time out of memory of man; and villein *in gross* is, when a man is seized of a manor, whereunto a villein is *regardant*, and granteth the same villein by his deed to another, then he is a villein *in gross*, and not *regardant*." Litt. §181. The Statute of 12th Charles II. may be considered as affecting only the former kind of villeins, that

is *regardant*, inasmuch as its object was the abolition of the tenure of lands by villenage, and as having left villenage in *gross*, which was a servitude which belonged to the person of the lord, where it stood at Common Law. I think this is the proper view of the effect of that Statute. Let this be conceded then, and that the Common Law as to villeins in *gross* was not repealed by the Statute; then it seems to me that it ought to be regarded as obsolete. This word is applied to such laws as have become inoperative by disuse, without being repealed. Courts of Justice will not, with facility, declare any law obsolete, more particularly a Statute. Disuse is evidence of the popular sentiment that a law is inexpedient, and ought not to be enforced. Long disuse is a presumption of repeal, but in case of a Statute, is rebutted by the fact, generally susceptible of demonstration, that it has not been repealed. The Courts, however, have gone so far as to hold Statutes obsolete, where the objects upon which they were intended to take effect, and the purposes for which they were enacted have, for a length of time, ceased to exist. Reasonably the rule is less stringent as to a law founded on custom or immemorial use. As use is the foundation of the Common Law, it is fair to infer its repeal, by long and well ascertained disuse. Where the subjects or persons upon which a rule of the Common Law operates, have long ceased—where the records of the Courts for many years exhibit no action under it, it may be, and it would seem ought to be held as obsolete, and disregarded by Judges. It is a familiar principle, that the reason of the law ceasing, the law itself ceases. 7 *Reps.* 69. *Coke's Litt.* 70, b. 13 *Serg. & Rowl.* 447. 1 *P. A. Browne's Reps. Appendix*, 28. 4 *Yeates' R.* 181, 215. *Rutherf. Inst.* b. 2, c. 6, §19.

As before stated, the last claim of villenage which the records of the British Courts exhibit, was in the fifteenth year of *James I.* in 1617. This was one hundred and fifteen years before the settlement of the Colony of Georgia, and one hundred and fifty-five years before the trial of the *Somerset* case. It is stated by *Mr. Hargrave*, that at the time of the last claim of villenage in the reign of *James I.* it was notorious, that the race of villeins

“was completely worn out,” by the continual and united operation of deaths and manumissions. Thus it is clear, that the Law of Villenage had gone into disuse in England, one hundred and fifteen years before the settlement of Georgia, and that the subjects of it had notoriously ceased to be, in 1617. It was, I am constrained to believe, no part of the Common Law in 1732. If this opinion be well founded, then there was no law in England at that time, and there is none now, which recognized villen servitude. It did not and does not, therefore, exist, and all the reasoning of the counsel, drawn from the fact that slavery was recognized by the Common Law, in the form of villenage, necessarily falls to the ground.

[4.] There is, however, higher ground than this, upon which to rest our judgment. If the laws of villenage be not obsolete, but still of force—if the institution of villenage was not extinct, but now existent, I hold that no argument could be derived from either, to prove that it ever was a felony in England to kill a negro slave; because of the difference between villenage and negro slavery, and the dissimilarity between the relations of master and slave, and those of lord and villein. Villenage was not a pure slavery. The unconditional slavery of the African race, as it exists in Georgia, never did exist in Great Britain. I do not mean, of course, in the *British Empire*, but in the *Island of Great Britain*. It has never had a *status* under the Common Law. Villenage was a feudal institution, and that form of it which we find in England, was established there by *William the Conqueror*, and his successors. The material for it in part, at least, was found by them, in the slaves of the *Saxons*. At their hands, they received that enlargement which is found in a transition from pure slavery to villenage. “On the arrival of the *Normans* here, (writes *Blackstone*,) it seems not improbable, that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty, which conferred a right of protection, and raised the tenant to a kind of estate, superior to downright slavery, but inferior to any other condition. This they called villenage, and the tenants villeins, &c.”



(*Black. Com.* vol. 2, p. 92.) See, also, the authorities referred to in the notes to the argument of *Mr. Hargrave, in the Somerset case*, (*State Tr.* vol. 20, pp. 36, '7.) The condition of a villein, had many of the incidents of slavery. His service was uncertain, and he was bound to do whatever his lord commanded. He was liable to beating, imprisonment, and every species of chastisement. He was incapable of acquiring property for his own benefit. The rule was "*quicquid acquiritur servo, acquiritur domino.*" He was the subject of property—saleable and transmissible. If *regardant*, he passed with the manor—if *in gross*, he was an hereditament, or a chattel real, being descendible to the heir when the lord was absolute owner, and transmissible to the executor, when the lord had only a term for years in him; and his condition of slavery extended to his issue, if both parents, or only the father was a villein, contrary to the rule of the Civil Law, which obtains also here, *partus sequitur ventrem*. *Coke's Litt.* 116, b. 2 *Ro. Abr.* 1. 2 *Inst.* 45. *Coke's Litt.* 126, '7, 117, a. *Litt.* §§181, 177. These were their chief disabilities. But they are broadly and plainly distinguishable from the slave of this country, in this, that they had both a civil and political capacity, neither of which appertains to him. And first, he was a subject, and as such, under the protection of the Crown. The lord could neither kill nor maim him. An appeal of murder lay in his favor against his lord, for the murder of his ancestor; and if maimed by his lord, he was liable to indictment therefor. *Litt.* §194. *Coke's Litt.* 116, b. 2 *Black. Com.* 94. 2 *Hill's C. R.* 390. If a subject, he was not unconditionally a slave. These two things are wholly incompatible. This is not all. His civil rights clearly distinguish him from a slave. He was "able and free, (says *Littleton*,) to sue all manner of actions against everie person, except his lord, to whom he is villeine." *Litt.* §189. A *neif*, (a female villein,) had an appeal of rape against her lord. *Litt.* §190. It was competent for him to act as executor. *Litt.* §191. So, also, he was capable of knighthood, and his person thereby became enfranchised, until, as *Coke* says, *he be disgraded*. *Coke's Litt.* 136, b. The reason given by *Lord Coke*, for the punishment of a lord for maiming his villein, is



conclusive of his relation to the Crown as a subject. "Nay; (says he,) the lord of a villein, for the cause aforesaid, cannot mayheme the villeine, but the King shall punish him for mayheming his subject, *for that, hereby he hath disabled him to do the King service.*" *Coke's Litt.* 127, a. This brief review of the relation of lord and villein, vindicates the proud boast of the British lawyers, that pure slavery never did exist in England, under the Common Law; and it further demonstrates, what will more fully appear, when we look into the *status* of negro slavery, that there is an irreconcilable difference between that and villenage, and it seems to me, also to dispose of the argument drawn from the law of villenage, in favor of the plaintiff in error.

[5.] I now consider the decisions of the English Courts, upon the subject of slavery, and I think it will be seen that slavery has never been recognized to exist there, under the Common Law. On the contrary, it is well settled, that the moment a slave, whether African, Indian, Jew or Gentile, sets his foot upon British soil, he is a freeman, and entitled to the protection of the laws, as such.

[6.] Before doing so, however, it may contribute to the perspicuity of this opinion, to dispose of certain other grounds, upon which it is contended, that slavery has been recognized in England. And first, it is argued that the slave trade is justified by the Laws of Nations, and to this allowance of the slave trade by International Law, England was a party in 1732, when the Colony of Georgia was settled, and thereby sanctioned slavery as an institution in England at that day. Thence follows the inference, that by her laws, which punished the killing of all human creatures, as a felony, it was a felony to kill a negro slave in England.

Whilst it seems to be conceded by Jurists of all civilized countries, that the slave trade is contrary to the laws of nature, upon the principle, that every man has a natural right to the fruits of his own labor, and therefore, no other person can rightfully deprive him of them, and appropriate them against his will; yet, it is also well settled, that it is not prohibited by the Laws of Nations. This principle of the Law of Nations originated in the

rights which war was originally held to confer. One of these rights was, that the victor might enslave the vanquished. This idea has been exploded by the States of Christendom, but obtains still, among many of the nations of the earth. Acquiescence in this belligerent right, for long centuries, established the doctrine that traffic in slavery is a lawful commerce. It is nowhere recognized as piracy even at this day, under the Laws of Nations. There can be no doubt, but that this view of the slave trade, has uniformly received the sanction of the English and American Courts. And to the Law of Nations thus understood, Great Britain was a party in 1732—and to this day, she recognizes its obligation upon all the States of the world which have not repudiated it by Statute or treaty. Each State may renounce it for herself, but as no principle is better settled than the perfect equality of nations, no one State can impose a rule on another. And although the traffic in slaves has been made piracy by a number of the States of Christendom, it remains lawful to all such as have not renounced it. *Case of the Antelope*, 10 Wheat. 66. *La Jeune Eugenie*, 2 Mason, 409. *The Amedie*, 1 Acton, 240. *The Fortuna*, 1 Dodson, 81. *The Donna Maria*, 1 Dodson, 91. *The Diana*, 1 Dodson, 95. *The Louis*, 2 Dodson, 238. *Madraw vs. Willes*, 3 Barn. & Ald. 353. *Greenwood vs. Curtis*, 6 Mass. 358. *Forbes vs. Cochrane*, 2 Barn. & Cres. 448. S. C. 3 Dowl & Ryl. 679. *Commonwealth vs. Aves*, 18 Pick. 193. *Recent case of the negro Sims in Massachusetts, not yet reported.*

Among the nations, the United States led the way in the abolition of the slave trade, and by Statute repudiated the Law of Nations. By the Constitution of 1789, Congress was restrained from passing any law prohibiting the importation of slaves into any State which might think proper to admit them, prior to 1808. Before that time, and as early as 1794, Congress passed a law prohibiting the citizens of the United States from engaging in the slave trade between foreign countries. 1 U. S. Laws, Story's edit. 319. This Act was followed by one yet more stringent, in 1800. 1 U. S. Laws, 780. In 1803, a law was passed, prohibiting the introduction of slaves into any port or place in the

United States, belonging to any State which had, or should prohibit the importation of slaves. 2 *U. S. Laws, Story's edit.* 886. In 1807, Congress prohibited, after the 1st day of January, 1808, the importation into the United States, and the territories thereof, from any foreign place, kingdom; or country, of any negro, &c. as a slave. 2 *U. S. Laws, Story's edit.* 1050. To the violation of these laws, severe penalties were affixed, but they were not found adequate to a prevention of the traffic. In 1820, therefore, the slave trader was declared a *pirate*, and upon conviction was made punishable with *death*. 3 *U. S. Laws, Story's edit.* 1798. These facts have, it is true, but little to do with the question I am considering. I record them as a tribute to the humanity and enlightened policy of our country, upon which slavery has been fixed, not by her own acts, but by the cupidity of her rulers, whilst in a colonial state.

It was not until 1807, that the first British Statute was passed, declaring the slave trade unlawful, contrary, as history tells us, to the wishes of the King, George III. As late as 1788, sixteen years after the decision of the *Somerset case*, it was estimated that the English bought in Africa, annually, about 30,000 slaves; that in the prosecution of the trade, her manufactures to the amount of 800,000 pounds sterling were exported, in return for which, she received nearly a million and a half pounds; and that the annual revenue of the government from the slave tax, was 256,000 pounds. In 1824, however, she declared the slave trade piracy, and with great energy exerted her influence among the States of Europe, to procure its abolition, and with such success, that at this day the States of Christendom very generally, have disclaimed the Law of Nations which justified it.

It is true then, that in 1732, when Georgia was settled, Great Britain was a party to the Law of Nations, which held dealing in slaves a lawful commerce. The question is, did this fact recognize slavery in England, as an institution under the protection of the Common Law? Clearly, it did not. The Laws of Nations are recognized by the Municipal Laws, and will be enforced upon the citizens and subjects of the States parties thereto, *in all cases when a question arises which is the object of their jurisdiction.*

They are recognized thus by the Common Law. 4 *Black. Com.* 67, &c. The Law of Nations tolerated, but did not enjoin the slave trade. The obligation of England under it, was to respect the rights of those States engaged in it, within their own territories, and upon the high seas. Vessels engaged in the traffic were not liable to seizure and confiscation. *Her* subjects were also equally entitled to protection under the International Law. I apprehend, however, that it is historically true, that neither by Statute, nor by usage, has Great Britain ever availed herself of the license of the Law of Nations, to introduce slavery into the island of Great Britain from Africa. In point of fact, pure slavery never did exist in England—neither by capture in war, by municipal authority, or by the Law of Nations. Had slaves been introduced into that part of her Empire by municipal authority, or had they been introduced without municipal, that is, without statutory authority, under a trade sanctioned by the Laws of Nations, the *status* of slavery would have been there, just what it is here. Property in the slave—the right to control his person—*his limits*, as *Lord Coke* expresses it, would have existed, and fallen under the protection of the Common Law. To any correct view of this subject, it is indispensable to distinguish between *Great Britain* and her Colonies. As to the latter, we know that slavery *there* did in fact, exist, and was sanctioned by usage under the Law of Nations, and by Acts of Parliament; as to the former, we know that it did not exist *there*, and received no such sanction. How could, then, the Common Law attach upon the institution of slavery, in the Island of Great Britain? The Laws of Nations would have justified slavery in England, had it been there. But they did not create it there. Whether by the comity of nations the English Courts are not bound to deliver a slave, coming into Great Britain from a State where slavery exists by law, to his rightful owner, to be taken back, as was the demand in the *Somerset* case, is a different question. *Lord Mansfield* held that they are not.

Nations being equal, the laws of one State have no operation in any other, *proprio vigore*. But by the comity of nations, contracts made in one State, are enforced in all others, according to

the law of the place where the contracts are made. This is the general rule, founded on the necessities of commerce—the obligations of justice, and the rights of sovereignty. The moral sense of the civilized world, and the perils and injuries of the only ultimate arbiter, war, constitute the guarantee of its observance. Each State, through its constituted authorities, however, has the unquestioned right to determine how far this rule of comity shall extend. Certain exceptions to the rule are recognized, as being well established. Ch. *Kent* generalizes them as follows: “no people are bound, or ought to enforce, or hold valid in their Courts of Justice, any contract which is injurious to their public rights—or offends their morals—or contravenes their policy—or violates a public law.” 2 *Kent’s Com.* 458. The property in a slave exists in a State where slavery is established, by contract, by gift, or inheritance. When a slave, owned by the citizen of a State where slavery is established, is found within the jurisdiction of a State where it is not established, the comity of nations would seem to us to require, that upon the demand of the owner, he be delivered into his custody; not to be there retained, but to be taken back to his own country. If the delivery was for the purpose of retaining the slave, within the foreign jurisdiction, and to allow the owner *there*, to exercise the power over his person which the laws of his own State permit, even for a period of time short of the term of domiciliation, the case would come within one of the exceptions, perhaps. The exercise of the rights of the master within the foreign jurisdiction, would establish there the *status* of slavery for a term, at least, and thus might contravene the anti-slavery policy of the State. This could not be, when the delivery is for the purpose (and such would be the terms of the judgment) of immediate removal.

[7.] In *England*, and in *Massachusetts*, the Courts have held that they are bound by the comity of nations, to respect the laws of other States, on the subject of slavery. They have held that a contract made in a slave State for the price of a negro, will be enforced. 20 *vol. State Trials*, 79. 18 *Pic.* 193. *Sims case*. Such a contract then, they being the judges, is not immoral—

is not injurious to their public rights—does not contravene their policy, or violate a public law. Still, these Courts will not enforce the foreign law, so far as the person of the slave is concerned. They will not deliver the slave, even upon condition that he be at once taken away. In the latter case, they take shelter under the idea, that slavery is inherently wrong, and condemned by their public policy. They do not say that it is violative of a public law, but claim that slavery can alone exist by positive law; and as they have no law which establishes it, when a slave comes into their jurisdiction, he is, *ipso facto*, a freeman. Now, so far as the ground of immorality is concerned, if good at all, it is as much applicable to a contract for the price of a slave, as to a contract for the body of a slave. If they enforce the former, they give sanction to slavery—they recognize the person of the negro as a chattel—the subject of sale. What more than this would they do, if they enforce the latter? Lord *Mansfield* said, that the laws of England attach upon a *contract for the price*. Why not upon a *contract for the person*? Why should not *trover* lie in England for a negro, there, bought in Georgia, by a citizen of Georgia, from a subject of Great Britain, resident in England? Upon the score of morality—of humanity—or of natural equity, I confess I see no difference. The ground that their law not recognizing slavery, affords no remedy, is equally untenable. Their general law giving remedies on contracts, and to recover property, ought to be applied to slaves as other property. Would a judgment of rendition and removal, violate the anti-slavery policy of a free State? It does not engraft slavery upon her institutions—it does not tolerate a slave population in the midst of her freemen. It restores the slave to the jurisdiction under which he became a slave, there to abide a destiny for which, neither legally nor morally, she is responsible. It leaves the sin and impolicy of slavery, if it be sinful and impolitic, with the slave State, and leaves her skirts stainless, whilst it responds to that obligation of comity, which is due from one sovereignty to another. The Apostle to the Gentiles, established the true rule of personal and national obligation upon this subject, when he delivered the refugee slave, Onesimus, back to his master.

Again, it is said that slavery was established in England, by Statutes which authorized the slave trade to her Colonies, and which recognized its existence in the Colonies. First, as to the facts. If there be guilt or impolicy in the slavery of the American States, it lies at the door of Great Britain, now so fierce in her denunciations of it. She was for years the patroness of the slave trade, and her cherished policy was to stock her transatlantic plantations with negroes. If slavery be a curse, which we do not concede, and which she asserts, it has been entailed upon us by the avarice of British kings, councils and people. Her slave policy ceased only, when she considered her Colonies well stocked. Her vaunted humanity was perseveringly subordinate to her interests. I am convinced that the zeal of *Blackstone*, and the eloquence of *Wilberforce*, would have availed but little, had not *Pitt and Fox*, and the merchants of *Liverpool and Bristol*, believed that the negroes of the Colonies, and their descendants, were sufficient, and would continue sufficient, for all the wants of British Colonial policy. In 1563, Sir *John Hawkins*, an English admiral, patronized by the protestant Queen *Elizabeth*, projected and executed a scheme for capturing, and enslaving, and selling in the West Indies, the descendants of *Ham*, on the continent of Africa. He was eminently successful, and it is said, was rewarded for the benefits conferred upon his country, by the addition of a crest to his coat of arms, consisting of "a demi-Moor, proper, bound with a cord." The trade received the sanction of repeated Acts of Parliament, and of patents from the Crown. By an Act, 9 and 10 *Wm. III.* c. 26, negroes are spoken of as merchandise, and by an Act, 5 *George II.* slaves in the West Indies were made saleable there, and subject to pay debts. In most of the American Colonies, there existed an earnest desire, developed in frequent attempts to rid themselves of slavery, which encountered the controlling opposition of the British authorities. Mr. *Madison* says, "the British Government constantly checked the attempts of Virginia, to put a stop to this infernal traffic." South Carolina passed a law to prohibit the farther importation of slaves, which was rejected by the King in council, because it was "beneficial and necessary for the mother country."



*Massachusetts* was the first of the American Colonies to participate in the slave trade, yet, when she was first disposed to stop importations, she was thwarted by the negative of the royal Governor Hutchinson, acting under instructions. The introduction of slaves was prohibited to the Colony of *Georgia* for some twenty years, not from motives of humanity, but for the reason that it was encouraged elsewhere, to wit: the interest of the mother country. It was a favorite idea with the "mother country," to make *Georgia* a protecting barrier for the *Carolinas*, against the Spanish settlements south of her, and the principal Indian tribes to the west. To do this, a strong settlement of white men was sought to be built up, whose arms and interests, would defend her northern plantations. The introduction of slaves was held to be unfavorable to this scheme, and hence its prohibition. During the time of this prohibition, Oglethorpe himself, was a slave-holder in Carolina, and so was Mr. Wesley, one of the best and greatest men of that epoch. During that time, the banner of St. George waved its protecting folds over half a million of slaves. The prohibition gave way in 1751, and the introduction of slaves was legalized by the Trustees, acting under authority from the Crown. Let these statements suffice to authenticate the fact, that slavery was recognized by law, in the British Colonies. *Bancroft's His. U. S.* vol. 2, 171. *Stephens' His. of Geo.* vol. 1, 285, '6, '7, '8. *Tucker's Blackstone*, vol. 1, part 2, 49, 51, appendix. *Madison's Papers*, 3, 1390. *Walsh's Appeal*, 327. *So. Carolina Statutes*, 2, 526. *Stephens' Journal*, 3, 281. *New Edinburg Encyclopedia*, title *Slavery*. *Encyclopedia Americana*, title *Slavery*, vol. 2, p. 429. 1 *Jefferson's Corresp.* 146. 2 *Elliott's Deb.* 335. 1 *Secret Journal of Congress*, 378, 379. *Story on the Const.* vol. 3, p. 203, §1328.

The recognition of slavery in the Colonies, did not establish it in England. This is the answer to the conclusion drawn by counsel. The Statutes of Great Britain do not apply to the Colonies, unless expressly extended to them, and the Acts which relate to the Colonies alone, have a local operation only. Such has been the ruling of the Courts at Westminster Hall. Expressly so held in reference to these very Statutes, in *Forbes vs.*



*Cochrane*, 2 Barn. & Cres. by Best J. p. 448. 1 Black. Com. 107, '8. 1 Chill. Com. Law, 638.

I return now to a review of the decisions in England, upon the subject of slavery. The authenticated cases in England, before the *Somerset* case, are five in number, to wit: *Butts vs. Perry*, in the 28th Charles II. 2 Lev. 201, and 3 Keb. 785. *Gelly vs. Clive*, in 5th Wm. and Mary. 1 Ld. Raym. 147. *Smith vs. Gould*, in 6th Anne. (2. Salk. 666.) *Chamberlaine vs Harvey*, in 8th and 9th Wm. III. (1 Ld. Raym. 147. Carth. 396. 5 Mod. 186,) and *Smith vs. Browne and Cowper*, (2 Salk. 666.) These cases are not very satisfactory. The first, *Butts vs. Perry*, was an action of *trover* for ten negroes. There was a special verdict, finding that the negroes were infidels—subjects of an infidel prince, and usually bought and sold as merchandize, by the custom of merchants, and that the plaintiff had bought, and was in possession of them. The Court held, that negroes being usually bought and sold among merchants in India, and being infidels, there might be a property in them sufficient to maintain the action. Judgment *ni si*. was given for the plaintiff, and further hearing being asked by the defendant, time was given. Mr. *Hargrove* states, that upon examination of the roll, it appears that final judgment never was given, there being on it, only an *ulterius consilium*. Although this authority is equivocal, yet its weight is in favor of property in slaves. The next case, *Gelly vs. Clive*, was *trover* for a negro and certain articles of merchandise. The Court held, that *trover* would lie for a negro, because negroes are heathen. In *Smith vs. Gould*, which was also *trover* for a negro and other things, the plaintiff had a verdict with several damages and 30 pounds for the negro. On motion in arrest, the Court held that *trover* could not lie for a negro. The case of *Chamberlain vs. Harvey*, was trespass *vi et armis*, for taking a negro. The Court gave judgment against the plaintiff, but it seems that the judgment went upon a question of pleading, the Court holding that the action should have been for the recovery of damages, for the loss of the service, and not for the value of the slave. So it is authority on neither side. The next case, *Smith vs. Browne and Cowper*, was *indebitatus assump-*

for 20 pounds, the price of a negro, sold to the defendant by the plaintiff, in *London*. The Court ruled in arrest of the judgment, which was given for the plaintiff, that the declaration should have averred that the negro, at the time of the sale, was in *Virginia*, and that by the laws of that State, negroes are saleable. This must be regarded as a judgment, that by the laws of *England*, negroes are not saleable. In this case, Mr. Justice *Powel* is reported to have said, "in a villein, the owner has a property; the villein is an inheritance, but the law takes no notice of a negro." And Lord Ch. J. *Holt*, "that one may be a villein in England, but as soon as a negro comes into England, he becomes free." Without commenting upon the reasons given for the decision in the two first cases, to wit: that negroes are infidels and heathen, further than to note, that such an idea prevailed very generally, even in *England*, and universally at that, and at an earlier day in other States, and that it seems to have been derived from the authority which God gave the Jews, to take and subdue, and enslave, if they could not convert, the heathen, in the land which was their promised inheritance, I remark, that the authorities before the *Somerset* case, appeared to be pretty equally balanced. A more minute investigation of them is unnecessary, for I hold that the question was distinctly settled in that case, and those that followed it.

In the *Somerset* case, it is very obvious, that Lord *Mansfield* felt his position to be embarrassing. His embarrassment grew out, as he expressed it, of "the extreme difficulty of adopting the relation, without adopting it in all its consequences." He recognized the relation of master and slave—he admitted that a contract for the price of a negro slave, was good in England, because, that was a matter upon which the law would attach. Admitting so much, it was difficult for him, as it is for any man, to deny the right of the master to control the person of the slave. That right, however, he held, was inconsistent with the laws of England. The person being the thing in controversy in the case, although *Somerset* was a slave, by the law of his master's domicil, he ruled, that the moment he set foot on the soil of England, he was free. Coming into England, he was, ipso

*facto*, a freeman. "The state of slavery, said he, is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law—it is so odious, that nothing can be suffered to support it but positive law." 20 *State Tr.* 80. The same doctrine has been held by later cases. *Forbes vs. Cochrane*, 2 *Barn. & Cres.* 448. 1 *Acton R.* 240. *S. C.* 1 *Dodson*, 84. *Idem*, 91, 95. 2 *Idem*, 210. *The slave, Grace*, 2 *Hagg. Adm. R.* 94 to 118. 1 *Bing. Com. on Col. and For. Law*, 735 to 752. 1 *Black. Com.* 424, 425. *Christian's note*, and *Coleridge's note*. Independent of the provisions of the Constitution of the United States, it obtains also, in some of the States of our Union. See, on these points *Saul vs. his Creditors*, 17 *Martin's R.* 598. 9 *American Jurist*, 490. *Butler vs. Hooper*, 1 *Wash. C. R.* 499. *Ex parte Simmons*, 4 *Idem* 390. *Butler vs. Deleplaine*, 7 *Serg. & Rawle*, 378. 6 *Binny*, 213. *S. C.* 2 *Serg. & Rawle*, 305. 14 *Martin*, 408. 7 *Louis. R.* 170, 172. *Commonwealth vs. Ares*, 18 *Pick.* 193. 6 *Mass. R.* 358. *The recent case of the negro Sims, in the Superior Court of Massachusetts.*

In the case of the slave *Grace*, Lord *Stowell* carried the recognition of slavery farther than it had been previously done in England. He held that a slave brought into England from the West Indies, where slavery is recognized, and voluntarily returning, would be reinstated in his condition of slavery. 2 *Hagg. Adm. R.* 94. Chief *J. Shaw*, *arguendo*, admits the same thing, in the *Commonwealth vs. Ares*, 18 *Pick.* 193. Neither Lord *Stowell* nor Chief *J. Shaw*, however, holds but that a slave in England or in Massachusetts, becomes free in those places, upon coming into them. We hold it, therefore, settled, upon authority, that *African slavery* does not, and never did exist in England. What then, is the inevitable conclusion? It is, that such a thing as killing a negro slave in England, is a legal impossibility, and could not be a felony under the Common Law. In other words, the Common Law has no application to the condition of slavery in England, or in Georgia. This is the question made in this record, and such is our judgment. It was conceded, on the trial of the *Somerset* case, that there were some

14,000 Africans then in England; and it is asked of what offence would a white man be guilty, who had killed one of them? I answer, felony. Why? Because, upon the principles of the English Courts, he had killed a freeman. Suppose that, upon the trial of such an one, before the *Somerset* case, even, the defence had been filed that it was no crime to kill a slave, the reply of the Court would have been, the deceased was not a slave, but a freeman, in the peace of the King, and under the protection of the laws. There this opinion might terminate, but some farther views of the topics necessarily involved, notwithstanding the length to which it has been extended, will surely be justified, on the ground of their relation to institutions, in which the destiny of Georgia, for weal or for woe, is deposited.

[8.] It is theoretically every where, and in Georgia experimentally true, that two races of men living together, one in the character of masters and the other in the character of slaves, cannot be governed by the same laws. Whatever rights humanity, or religion, or policy, may concede to the slave, they must, in the nature of the relation, be often different from those of the master. The forms of proceeding, and the rules of evidence for their protection, as well as the penalties for their violation, must necessarily, in many instances, be different. The civil rights of the master do not appertain to the slave. Of these, he can have none whatever. The rights personal, if they might be so designated, of the slave, are, some of them, essentially different from those of the master, and cannot, therefore, be the subject of a common system of laws. *They must be defined by positive enactments, which, whilst they protect the slave, guard the rights of the master.* If the Common Law be applicable to a state of slavery, it would seem to be applicable as much in one as another particular. If it protects the life of the slave, why not his liberty? and if it protects his liberty, then it breaks down, at once, the *status* of the slave. The Colonies received the Common Law, as applicable to their condition, that being in numerous particulars different from that of the parent State. They received it as *slaveholding* communities, and as applicable to them as slaveholders. It is absurd to talk about the Common

Law being applicable to an institution which it would destroy. It came to our fathers as the law of the white man, a subject of the British Crown, so far as his circumstances made it desirable to him to appeal to its protection. It recognized slavery only in one point of view, and that is, as an interest to be protected for the benefit of the masters. It may be said, that the Common Law, in protecting the life of the slave, interferes with no right of the master, inasmuch as the master has no right to take the life of his slave. The title to a slave in Georgia now, and under the Colonial Government, is not and was not derived from positive law. The faculty of holding slaves was derived from the Trustees of the Colony, acting under authority of the British Crown, as a *civil* right, in 1751, by an ordinance of that board. Before that time, their introduction was prohibited. The regulation of slave property is as much the province of municipal law, as the regulation of any other property, and its protection equally its obligation ; but we deny that property in slaves, and the title by which they are held, are the creations of statutory law. To view this question fairly, let the inquiry go back to a period subsequent to the ordinance of the Trustees, in 1751, and anterior to any legislation upon the subject of slavery. Licensed to hold slave property, the Georgia planter held the slave as a chattel ; and whence did he derive title ? Either directly from the slave-trader, or from those who held under him, and he from the slave-captor in Africa. The property in the slave in the planter, became thus just the property of the original captor. In the absence of any statutory limitation upon that property, he holds it as unqualifiedly as the first proprietor held it ; and his title, and the extent of his property were sanctioned by the usage of nations, which had grown into a law. Property thus acquired in slaves, was *confirmed* by Statute in Georgia, (*Walkins' Dig.* 163,) and recognized by the State Constitution, (*Constitution of* 1798, *art.* 4, §§11, 12, *Prince's Dig.* 913,) and by the compromises of the Federal Constitution. *Cons. U. S. art.* 1, §§2, 9, *art.* 4, §2, *Prince*, 891.

There is no sensible account to be given of property in slaves here, but this. What were, then, the rights of the African chief

in the slave which he had captured in war? The slave was his, to sell, or to give, or to kill. The whole doctrine upon this great question, is summed up by Lord *Coke*, treating of villenage, thus: "*Fiunt etiam servi liberi homines captivitate de jure gentium*, and not by the law of nature; as from the time of Noah's flood forward, in which time all things were common to all, and free to all men alike, and lived under the law natural, and by multiplication of people, and making proper and private things that were common, arose battles. And then it was ordained by constitution of nations, that none should kill another, but that he that was taken in battle, should remain bond to his taker forever, and he to do with him, and all that should come of him, his will and pleasure, as with his beast or any other chattel, to give, or to sell, or to kill." He proceeds to say, that afterwards it was ordained of Kings, that none should kill his villein. *Coke's Litt.* 116, b. So that slaves were on the footing of a beast or other chattel. The will of the master was the law of slavery. The limitations of this law—the restraints upon the will of the master, were ordained of Kings, or imposed, as in Georgia, by Municipal Law. There is nothing in the charter of the Colony, in the colonial legislation, in the State or Federal Constitution, or in our State legislation, which conflicts with this view of the original of slavery. On the contrary, as I shall show; the inference is irresistibly drawn from the Colonial Act of 1770, the first Act which punishes the killing of a slave, that such was the view which our ancestors of that day took of the power of the master over the slave. I know very well, that the British Courts, and the Courts of some of our own States, hold that slavery is the creature of what Lord *Mansfield* called, *positive law*; yet, it is worthy of remark, that the Courts of Massachusetts have been driven, by the constraining necessities of truth, to say that *positive law* may mean *customary law*. 18 *Pick.* 198. *Case of the negro Sims.* What is definitely meant by *customary law*, they do not declare. It must mean the usages of the State where slavery exists, springing up under the slave trade, and sanctioned by the Law of Nations. Thus it is that we trace property in negroes to Africa. It is immaterial how slavery ori-

ginated there ; whether as a penalty for offences against the State, or by captivity in war, or by an immemorial and impenetrable slavery cast in some of the tribes of that dark land. It was there, as Lord *Coke* represents it, pure, unmitigated slavery, and so our ancestors received, and so it remained until legislation, prompted by christianity, softened its severities. The curse of the Patriarch rests still upon the descendants of Ham. The negro and his master are but fulfilling a divine appointment. Christ came not to remove the curse ; but recognizing the relation of master and servant, he prescribed the rules which govern, and the obligations which grow out of it, and thus ordained it an *institution of christianity*. It is the crowning glory of this age and of this land, that our legislation has responded to the requirements of the New Testament in great part, and if let alone, the time is not distant when we, the slaveholders, will come fully up to the measure of our obligations as such, under the christian dispensation. The laws of Georgia, at this moment, recognize the negro as a man, whilst they hold him property—whilst they enforce obedience in the slave, they require justice and moderation in the master. They protect his life from homicide, his limbs from mutilation, and his body from cruel and unnecessary scourging. They yield to him the right to food and raiment, to kind attentions when sick, and to maintenance in old age ; and public sentiment, in conformity with indispensable legal restraints, extends to the slave the benefits and blessings of our Holy Religion. Conceding that there are violations occasionally on the part of the master, of the obligations of humanity, yet it may be asserted, with truth, that the relation of master and slave in Georgia, is an institution subject to the law of kindness to as great an extent as any institution springing out of the relation of employer and employed, any where existing amongst men.

The question whether the Common Law is applicable to slaves, has been considered in some of our slaveholding States, and the decisions are not uniform. In Mississippi it was held, that by the Common Law, it is murder to kill a slave. *The State vs. Jones, Walker's Reps.* 83. So, in Tennessee it was held, that



killing a slave without malice, is manslaughter by the Common Law. 1 *Yerger*, 156. These are the only two cases brought to our notice in the argument. Separating the fervid zeal in behalf of humanity to the slave, from the legal grounds upon which the judgments were rendered in these two cases, we find that they are based upon the fact, that the killing of a villein was a felony at Common Law, and, therefore, the killing of a negro is a felony here. I have endeavored to show, that this ground is wholly untenable. We feel as keenly as these Judges did, the obligation derived from religion and humanity, to punish the killing of a negro; but let it be remembered, that we sit here, not to censure or reprove the errors or crimes of any age or country, but to determine a naked question of law upon legal principles. Besides, there is no necessity that any slave State of this Union should lie under the reproach of not protecting the person of the slave. It is competent for the States, (as indeed they have done without, I believe, a single exception,) to provide, by Statute, protection to the slave. This has been done in Georgia. That the Common Law is not applicable to the *status* of the slave has been decided, and the decisions sustained by the most satisfactory argument and authority in North and South Carolina. *State vs. Boom*, *Taylor's R.* 103. *State vs. Mann*, 2 *Dev. Law R.* 263. *Fable vs. Brown's Ex'rs*, 2 *Hill's S. C. Ch. R.* 378.

[9.] Moreover, the Act of 1770, which is the first Colonial Act providing for the punishment of white men for killing slaves, is perfectly conclusive, that prior to that time it was not an offence against the law—of course the Common Law—to kill a slave, and that there was no limitation of the power of the master over him, except that which religion, or humanity, or interest may be presumed to have imposed. The evidence which this Act furnishes, is derived first from the Act itself. Why legislate at all upon the subject, if the slave was protected by the Common Law? I admit that this alone is not conclusive, particularly for the reason, that the punishment which is prescribed, varies from that which the Common Law imposes for murder; but second, from the recitals in the general preamble to the Act,



and of the preamble to that section which creates the offence. The first preamble recites as follows: "Whereas, from the increasing number of slaves in this Province, it is necessary as well to make proper regulations for the future ordering and governing such slaves, and to ascertain and prescribe the punishment of crimes by them committed, *as to settle and limit, by positive laws, the extent of the power of the owners of such slaves over them, so that they may be kept in due subjection and obedience, and owners or persons having the care and management of such slaves, may be restrained from exercising unnecessary rigor or wanton cruelty over them, therefore be it enacted,*" &c. The preamble to the section which creates the offence, recites as follows: "Whereas, cruelty is not only highly unbecoming those who profess themselves christians, but is odious in the eyes of all men who have any sense of virtue or humanity, therefore, to restrain and prevent barbarity being exercised towards slaves, be it enacted," &c. Now, we say that it is clear, from these recitals, that before the Act of 1770, cruelties and barbarities to slaves were exercised, and that there was no restraint upon the power of the master, by law, over his slave. No other inference is possible. The judicial history of the State confirms our judgment. It is not within memory, that a white man has been tried in our Courts for any offence against a slave, not prescribed by Statute. The judicial records show no such case. *Watkins' Digest*, 163.

Let the judgment be affirmed.

No. 103.—GEORGE W. TOWNS, Gov. &c. for the use of BREED-  
LOVE, &c. vs. JOHN S. STEPHENS, SAMUEL T. BEECHER and  
others, defendants in error.

[1.] A bond being taken and approved by three Justices of the Inferior Court, to protect the people of a County, from the official misconduct of the Sheriff elect, it is not competent for the same Justices to discharge this obligation, by the substitution of another bond, some thirty days thereafter; especially, where one of the three Justices was a *co-obligor* in the *first* bond.

Debt, &c. in Baldwin Superior Court. Tried before Judge  
HANSELL, Feb. Term, 1851.

This was an action on a Sheriff's bond, made by John S. Stephens, as principal, and Samuel T. Beecher, M. J. Kenan, and John M. Maclin, as sureties, and attested by Charles D. Hammond and John S. Thomas, two of the Justices of the Inferior Court of Baldwin County.

On the trial, the plaintiff proved by John S. Thomas, that he was present on the 11th day of January, 1840, when the bond was executed; Hammond and Samuel T. Beecher, were also present, being Justices also of the Inferior Court. The bond was accepted by the three Justices, as a Sheriff's bond; Beecher did not attest the bond, because he was one of the sureties; witness objected to taking the bond for some time, but he yielded to the others. The bond was then tendered and read to the Jury, as a voluntary bond; the breach by the Sheriff was admitted, in failing to pay over money on a judgment, obtained in October, 1840.

Defendants then proved by John S. Thomas, that on the 3d March, 1840, a second bond was executed by Stephens, the Sheriff, with other sureties, attested and approved by three Justices of the Inferior Court—Beecher, the surety to the *first* bond, being one of them—and was taken in lieu of, and as a substitute for the first bond; the Justices believing the first bond illegal. No one was present when the second bond was taken, except the Justices and the obligors thereto. An affidavit of illegality had

been filed by Col. S. Rockwell, to a levy by Stephens, on the ground that the first bond was not good—Beecher being a surety thereto, who was one of the Court. Gov. McDonald, the obligee, was not present. Similar evidence was offered by the depositions of Charles B. Hammond, another Justice of the Inferior Court.

The second bond, dated 3d March, 1840, was then offered in evidence.

Counsel for plaintiff objected to the bond, and all of the evidence going to show that the new bond was received as a substitute for the first bond, on the ground that it was not competent for the Justices who took the second bond, to discharge the obligees to the first bond.

The Court overruled the objection, and this decision is assigned as error.

Plaintiff's counsel requested the Court to charge the Jury: "That the taking of the second bond was no discharge of the obligations of the first bond, upon which this action is brought, and that plaintiff was entitled to recover, notwithstanding the execution of the second bond, and notwithstanding any undertaking or agreement, at the time of the execution of the second bond, by the Justices, that the same should operate as a discharge of the first bond."

The Court refused so to charge, but on the contrary, instructed the Jury, among other things—"that if the Jury believed that Stephens, after the execution of the bond sued on, gave a second bond, which was accepted by three Justices of the Inferior Court, in lieu of, and as a substitute for the bond sued on, then the sureties on the first bond were discharged from liability for the misconduct of the Sheriff, occurring after the acceptance of such second bond."

The refusal to charge, and the charge as given, are assigned as error.

**Conz**, counsel for plaintiff in error, submitted the following points and authorities:

1st. The bond sued on, is a valid bond, although attested by only two Justices. Certainly it is a good Common Law bond.

*Stephens vs. Treasurers*, 2 *McCord*, 107. *Goodman vs. Carroll*, 2 *Humph.* 490. *State vs. McAlpine*, 4 *Iredell*, 140. 3 *Dev. R.* 384. 4 *Ib.* 270. 10 *Yerger*, 465. *Carmichael vs. Gov.* 3 *How. Miss. Reps.* 236. *Bryan vs. Greene*, 8 *Miss. R.* 115. *Schellinger vs. Yends*, 12 *Wend.* 306. *Young vs. State*, 7 *Gill & Johnson*, 253. *Stephens vs. Crawford*, 1 *Kelly*, 574. 3 *Ib.* 499. 5 *Ib.* 569.

2d. The Justices possessed no power to discharge the obligations of this bond, or to release the obligors from their liability upon it. *Prince's Dig.* 176, '7, 430. *Taylor vs. Auditors*, 2 *Pike's Reps.* 174. *Hill vs. Calvert*, 1 *Rich. Eq. Reps.* 56. *Polk vs. Wisner*, 2 *Humph.* 520. *State vs. McLean*, 2 *Blackford*, 192. *Bank of Newbern vs. Pugh*, 1 *Hawks*, 198.

3. Admitting that they possessed such power, there was no legal and valid exercise of it, nor was anything done by them which discharged the obligations of said bond, or released the obligors from their liability upon it. This can only be done by cancellation or release. *Manhood vs. Crick*, *Crocks Elis.* 716. *Norwood vs. Grype*, *Ib.* 727. *Steptoe's Admr. vs. Harvey's Admr.* 7 *Leigh*, 501. *Higgins' case*, 3 *Coke's Reps.* 346. *Bailey vs. Wright*, 3 *McCord*, 484. *Roades vs. Barnes*, *Burrow's Reps.* 1 vol. 9.

Points made, and authorities cited, by I. L. HARRIS, for securities, defendants in error—

The bond sued below must be considered as a voluntary bond. See case, *Governor, for use of Tarpley, vs. Meredith*.

If a voluntary bond, and it was offered and received below as such *only*, it could not have been taken, pursuant to Judiciary Act of 1799, (*Prince*, p. 480, or 1803, *Prince's Dig.* 176), and, therefore, the extent of authority conferred on those taking it by these Acts, cannot be the question.

The question is, may not those who, of their own accord, without any requirement of law, have taken a voluntary bond, and

with whom it is deposited, control that bond, so as to release or discharge the securities thereto?

The Governor, as the obligee, may release it directly. The agents of the obligee may do the same, by previous authority or subsequent ratification of their act, by silence and acquiescence.

The bond sued on was *substituted* by another—that second bond was sued on by the obligee and present usee—and they are estopped to deny the power of the agents in receiving the last, in lieu of the one sued.

The bond sued on should be declared void, for that one of the obligors sat in judgment upon its goodness and sufficiency, and without him, there was not an approval by three Justices.

The principle of the decision, in 6 *Geo. Rep.* 443, supports this ground. The Acts of 1799 and 1803, exhibit a general and unlimited delegation of power to take Sheriff's bonds, unless the direction to take "*good and sufficient securities, inhabitants and freeholders of the County, &c.*" be understood as restrictive.

A power imperfectly exercised, as in this case, by taking *insufficient security*, cannot be said to have been executed, until the duty is performed *enjoined* by Statute.

A general and unlimited power to take *good and sufficient securities*, must be held to include *all* the necessary and usual means of executing it with effect. *Comyn's Dig. Atty. c. 5 John. Reps.* 58. *Liv. on Agency*, 103.

Where the law commands or directs a thing to be done, it authorizes the *performance of whatever acts may be found necessary* for executing its command or direction. *Paley on Agency, passim.*

The Justices here, did not cancel and surrender a security to the public; they added to ~~that~~ security, by receiving a solvent obligor in lieu ~~of an insolvent one~~. This was merely taking a ~~cumulative security—a power~~ admitted to belong to them—a power auxiliary and subordinate to the other, and vital to the proper exercise of the power granted to take bond.

*By the Court.*—LUMPKIN, J. delivering the opinion.

[1.] Was the *first* bond vacated by the taking of the *second*? We think not.

The record shows, that the first was a good statutory bond. Consider it, however, as a voluntary bond; still it was given to protect the people of Baldwin County, against the official misconduct of Stephens, the Sheriff. The *cestui que trust*—the beneficiaries of the obligation—being incapable of giving or withholding their assent to this substitution of securities, it could not be done without authority of law; and this distinguishes this case from one of ordinary agency.

But the insuperable objection to the change of security is, that three only of the Court *approved* of the *second* bond, and one of these was Beecher, a *co-obligor* in the *first* bond, which it is contended, was discharged.

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No. 104.—EDWARD VARNER, plaintiff in error, vs. HENRY J. LAMAR, defendant in error.

[1.] In a suit on a negotiable promissory note, the defendant will not be permitted to question the plaintiff's title to the paper, unless it is made to appear that it is necessary for the purpose of his defence.

Assumpsit, &c. in Jasper Superior Court. Tried before Judge JOHNSON, October Term, 1851.

Suit was brought by Henry J. Lamar, against Edward Varner, maker, and John Thurmond, indorser, of a promissory note. Judgment was obtained against both, and an appeal entered by Varner alone. Varner pleaded, that Lamar was not the true owner of the note, but that the same was the property of Thurmond, and had been indorsed by him to Lamar, to avoid a plea of set-off by Varner against Thurmond. The plea further set

forth, that Thurmond was indebted to Varner, a large amount, which was more particularly set forth in the plea. Pending the appeal, Varner filed a bill, praying discovery from Lamar, as to the ownership of the note; in answer to which bill, Lamar admitted that the note belonged to Thurmond, but denied that it was transferred to him for the purpose of defeating any plea of set-off.

Upon the trial, Varner withdrew the plea, specifying the set-off claimed, and gave in evidence to the Jury, only the bill and answer above referred to.

Varner, by his counsel, then requested the Court to charge the Jury, "that if they believed that the plaintiff in the case was not the owner of the note at the time of the commencement of the action, or at any time subsequent thereto, or that the transfer by Thurmond to the plaintiff, was made for the purpose of defeating defendant's right of set-off, they should find for the defendant."

The Court refused so to charge, but on the contrary, charged the Jury, "that the *bare fact* that the plaintiff was not the owner of the note sued on, unaccompanied by any evidence of any set-off or indebtedness on the part of Thurmond to Varner, or without any evidence of the transfer being made for the purpose of defeating the defendant's right of set-off, did not of itself entitle the defendant to a recovery."

To which refusal to charge, and the charge as given, defendant's counsel excepted, and error has been assigned thereon.

CONE, for plaintiff in error.

MERIWETHER, for defendant in error.

*By the Court.*—WARNER, J. delivering the opinion.

[1.] The error assigned in this case is, the refusal of the Court to charge the Jury as requested, and to the charge as given to the Jury, by the Court. According to the facts, as exhibited by the record, the Court below did not err in refusing to charge as requested; for the reason, there was no evidence that the defendant had any

demand which he was entitled to set-off against the note sued on. The defendant had *withdrawn* his plea of set-off. This Court has repeatedly ruled, that the defendant could not, in a suit on a negotiable note, question the title of the plaintiff, unless it is made to appear that it is necessary for the purpose of his *defence*. *Nisbet vs. Lawson*, 1 *Kelly*, 275. *Field vs. Thornton*, *lb.* 306. *Hall vs. Carey*, 5 *Geo. Rep.* 239. Here, there was *no evidence* that the defendant had any defence to the note, by way of set-off, or otherwise. There was no error in the charge of the Court to the Jury.

We have been requested to certify in this case, that in our opinion it was not taken up for delay only, so as to avoid the damages given by the Statute. We find nothing in this record which will authorize us to give such a certificate. This Court has decided, at least in three several cases, that the defendant could not question the title of the plaintiff to the note, unless it was necessary for his defence. The defendant assumed in his request to the Court to charge the Jury, that he had a defence to the note, by way of set-off, when in point of fact, he had voluntarily withdrawn his plea of set-off, and stood before the Court without any legal defence whatever, so far as the record shows, and the legal presumption is, that which does not affirmatively appear, does not exist.

The object of the Statute was to prevent delay, and if parties will bring up their cases to this Court, for that purpose alone, they may expect to pay the penalty awarded by it. Let the judgment of the Court below be affirmed.



# **SUPREME COURT OF GEORGIA.**

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**Branch vs. Dawson.**

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**No. 105.—JAMES C. BRANCH and JOHN BRANCH, administrators, &c. plaintiffs in error, vs. GEORGE M. DAWSON, defendant in error.**

[1.] After the pleadings are made up, and the cause set down for a hearing, the answer cannot be amended, upon the ground that the defendant was ignorant of the availability in law of a fact within his knowledge from the time the suit was instituted, as a defence thereto.

In Equity, in Greene Superior Court. Tried before Judge STARNES, March Term, 1851.

George M. Dawson, as one of the distributees of William S. Branch, deceased, in July, 1849, filed his bill for an account against James C. Branch and John Branch, as the administrators of said deceased. At March Term, 1850, the joint answer of the defendants was filed, and at the same term an appeal was entered, by the consent of parties.

At September Term, 1850, the defendants filed an affidavit, stating that letters dismissory from their trust as administrators, had been granted them by the proper Court, several years since, and before the filing of this bill; that being ignorant that such discharge would avail them anything in the defence of said bill, they did not communicate the fact to their solicitors, until casually the fact was stated within the hearing of one of them, on the day this affidavit was made, when, for the first time, defendants were informed and knew of that fact being available to them; and but for this ignorance on their part, such fact would have been pleaded and relied upon.

Upon the filing of this affidavit, Judge *Johnson* granted a continuance, with leave to defendants to prepare and tender a supplemental answer—its sufficiency or admissibility, being left an open question, to be decided when presented.

At March Term, 1851, Judge *Starnes* presiding, the supplemental answer was presented, and on argument being had thereon, the motion to admit the amendment or supplemental answer, was

refused by the Court. This decision was excepted to, and is now assigned as error.

N. G. FOSTER and MERIWETHER, for plaintiff in error.

CONE, for defendant in error.

*By the Court.*—NISBET, J. delivering the opinion.

[1.] The Courts do not favor amendments to answers in Chancery. It is done with difficulty. It cannot be done in this case. The only reason which the defendants give for amending the answer, the pleadings being made up and the cause for trial on the appeal, is, that they did not know that their discharge would be available to them in defence of this suit. They knew of their discharge, from the beginning. They were obliged to know of it. What then, is the ground—the only ground of the request to amend? It is a misconception, or ignorance of their legal rights and remedies. This ground is untenable. An answer cannot be taken off the file and amended, or amended by supplemental bill, according to the modern practice, because a party was ignorant of the law of his case.

*See Martin vs. Atkinson*, 5 Geo. R. 340. *Carey vs. Ector et al.* 7 Geo. R. 99.

In *Martin vs. Atkinson*, the amendment was allowed, but the facts were wholly different from the facts of this case.

*Linsey vs. Wilson*, 1 Vesey & Beames, 140. *Bower vs. Cross*, 4 John. Ch. R. 375. *Giles vs. Giles*, Bailey Eq. R. 420. 4 Hen. & M. 405. 2 Danl. Ch. Prac. 805, 911. *Story Eq. Plead.* §§895, '6, '7, '8, '9, 900, '1. *Cowper's Eq. Plead.* 337, '8. *Mitford's Eq. Pl. by Jeremy*, 328. 1 P. Williams, 396. 3 Atk. 522. 3 Wend. 586. 6 Cond. Ch. R. 291.

Let the judgment be affirmed.

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Meriwether and another ~~vs. Bird~~ and another.

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No. 106.—JAMES A. MERIWETHER and DANIEL SLADE, plaintiffs in error *vs.* ALEXANDER J. BIRD and JAS. L. BIRD, administrators *de bonis non*, &c. of Wm. BISCOE; deceased.

- [1.] Set-off not allowed by the Common Law.
- [2.] The Statute of 2 *Geo. II. ch. 22*, has been introduced generally, into the United States, with certain modifications.
- [3.] Set-off is a plea in bar of the plaintiff's action.
- [4.] The commencement of the action, and not the time of trial, is ordinarily the period at which ~~mutual~~ debts are to be set-off against each other.
- [5.] The doctrine of set-off was borrowed from the Civil Law, and should be interpreted by the same principles of construction.
- [6.] Justice demands that the claim of the debtor not bearing interest, should be set-off against that of the creditor drawing interest, as of the time it became due and owing.
- [7.] Our Statute disallowing interest on open accounts, does not in any way affect the law of set-off.

Assumpsit, &c. in Putnam Superior Court. Tried before Judge Johnson, March Term, 1851.

Suit was brought by the administrators of Wm. Biscoe, against James A. Meriwether and Daniel Slade, upon a promissory note for \$633.75, dated 12th January, 1838, and due, 25th December, 1838. Defendant, James A. Meriwether, pleaded and proved, by way of set-off, an account for services rendered as an attorney, at various times during the years 1839, '40, '41, amounting to \$410.69.

Defendant's counsel requested the Court to charge the Jury, "that in making the calculation of what was due between the parties, the defendants had a right to have their set-off allowed as a credit on plaintiff's demand, as of the time at which the services rendered were due," which charge the Court refused to give, but on the contrary, charged the Jury, "that defendants were entitled to have what was proven to be due defendant, allowed as a credit only of the time at which the then trial was had." "The Jury should ascertain what amount was due

Meriwether and another *vs.* Bird and another.

plaintiffs at that time, and if defendant's set-off exceeded that amount, give a verdict for defendants, for the balance; but if it did not exceed it, then to give a verdict for plaintiffs for the difference between the two amounts."

This charge and refusal to charge, are assigned as error.

MERIWETHER, for plaintiffs in error.

J. WINGFIELD, for defendant.

*By the Court.*—LUMPKIN, J. delivering the opinion.

The plaintiffs in error were sued by the administrators of William Biscoe, deceased, upon a note given by them, to the intestate in his life time. They pleaded a set-off for professional services rendered the deceased, and the only question in the cause is, at what time the account should be deducted. The Circuit Judge held, at the time of the trial, and this opinion is excepted to, and is now assigned as error.

[1.] The object of a set-off, is to liquidate the whole, or a part of the plaintiff's demand. As a remedy, it was unknown to the Common Law, according to which, mutual debts were inextinguishable, except by actual payment or release. *Bab. on Set-off.*

[2.—3.] By the Statute of *Geo. II. c. 22*, which has been generally adopted in this, and all the other States of the Union, with some modifications, the defendant is allowed, in cases of mutual debt, to set-off his claim against the plaintiff's, by *pleading it in bar*. 5 *Taunt.* 148. 2 *Camp.* 594. 8 *Watts' R.* 39. 9 *Watts' R.* 170.

[4.] If the plea of set-off then, is good *in bar*, it is obvious, that the party is entitled to have his demand applied as a credit, at the time the action is brought; otherwise, where the suit is pending for any length of time, as it was in the present instance, an open account, which was a complete bar at the commencement of the action, would fail finally to liquidate the plaintiff's note, with the accruing interest.

Indeed, the whole doctrine of set-off, has reference to the situation of the parties at the time of the commencement of the suit. If the plaintiff has a valid cause of action at that time, it is not in the power of the defendant to defeat it and charge him with costs, by any act of his own afterwards, and to which the plaintiff was no party; as for example, by purchasing up claims against the plaintiff, for a larger amount.

[5.] The doctrine of set-off was taken from the Civil Law, and was introduced to advance justice, as well as convenience, (*pr. Kent, J. 3 Johns. Cases, 155.*)

[6.] Now, the rule of that code has been correctly cited by the learned counsel, from *Pothier*, namely: if you have a debt due from me, which carries interest, and afterwards become my debtor of a sum which, from its nature, does not carry interest, my debt will be held to be discharged to the extent of the mutual credit, from the time of such credit taking place, and interest would only be due for the balance, from that time—and the author puts the following illustration: If you are my creditor of a sum of £1000, for the price of an estate which you have sold and conveyed to me, and afterwards you become sole heir to Peton, and in that quality my debtor for £800, the amount of a loan from me to Peton; from the death of Peton, your demand of £1000 is to be regarded as acquitted, to the amount of £800, and subsisting only for the remaining £200, and from the death of Peton, the interest will only continue to run upon the remaining £200.

Is there anything in our law of set-off which excludes this construction? I know of nothing, and it is so manifestly right, that it commends itself to the conscience of every man. Interest is only given by way of damages for the detention of a debt. But if A owes B \$500, and B owes A \$300, can it be adjudged that A withholds anything but the balance of the \$200?

[7.] But it is contended, that our Statute forbids the allowance of interest on open accounts. It is one thing, however, to compute interest on a debt which is sought to be recovered in a separate and independent proceeding, and quite another, so to apply a mutual demand, as to prevent the accumulation of inter-

est upon the contra claim. Our law of executors, postpones the payment of open accounts, to promissory notes; and yet, if a debtor of the deceased, by note, is sued by the representatives, he may plead his open account and thus extinguish the demand, notwithstanding debts of higher dignity are thereby defeated.

I am not one of those who are forever complaining of our own legislation, and who think that nothing good can be done on this side of the great water. On the contrary, I believe, before God, that we live under the wisest code, civil and criminal, that was ever devised by the wisdom of man. Still, I am not insensible to its imperfections, and among its defects, I would unhesitatingly class all those provisions which debase open accounts; I am bound, nevertheless, to enforce the Statute disallowing interest on unliquidated demands. I am under no obligation, however, to extend it to a case not embraced within its terms.

I consider the *Commonwealth* against *Clarkson*, administrator of *Passmore*, (1 *Rawle's R.* 291,) as directly covering this question. The Supreme Court of Pennsylvania, there held, that mutual demands extinguish each other, by *operation of law*, without waiting for any act of the parties.

But there is another principle which would seem to entitle the defendants to the relief which they seek, and that is, in cases of mutual credit, where there is knowledge on both sides, of an existing debt due to one party and a credit by the other party, founded on, and trusting to such debt, as a means of payment, that the law will so apply it. All the authorities upon this subject, will be found collected in a note to *Story's Eq. Jur.* 2 vol. §§14, 36.

If it should be said, that this redress can only be had in Chancery, I reply, that our Common Law Courts have all the powers of Equity in this respect, and will administer justice by the same rules.

In our view of this matter, then, we are constrained to reverse the judgment below, and direct a new trial.

No. 107.—WILLIAM H. DEUPREE, plaintiff in error, vs. JOHN EISENACH, defendant.

[1.] Where an attachment was sued out by the attorney of the creditor, who stated in his affidavit, that he was "*informed and believed*" that the debtor resides out of this State: *Held*, that the affidavit was not sufficient, and that the affidavit ought to have stated, in the words of the Statute of 1799, "*that his debtor resides out of this State.*"

Attachment, in Oglethorpe Superior Court. Decision by Judge BAXTER, April Term, 1851.

The attachment in this case was sued out by Edward C. Shackelford, as the attorney of William H. Deupree. The affidavit stated, that deponent "was informed and believed that defendant resided out of the State, so that the ordinary process of law could not be served upon him."

On motion, the Court dismissed the attachment, on the ground that the affidavit was insufficient, because the deponent did not swear, positively, as to the non-residence of defendant.

This decision is assigned as error.

THOMAS R. R. COBB, for plaintiff in error.

JOSEPH H. LUMPKIN, Jr. for defendant in error.

Judge LUMPKIN did not preside during the argument and decision of this case.

*By the Court.*—WARNER J. delivering the opinion.

[1.] By the 2d section of the Act of 1799, an attachment is authorized to issue upon complaint made on oath by the creditor, that his debtor *resides out of this State*. Here the party suing out the attachment states, in his affidavit, that he is "*informed and believes*" that his debtor resides out of the State. The Act of 29th December, 1836, relates to the *indebtedness* of the de-

fendant, and not to his *residence*. In *Levy vs. Milman et al.* (7 Ga. R. 170,) we held, that inasmuch as the process of attachment was a summary remedy given by Statute to the creditor, that it must be construed *strictly*. The argument is, that the Court ought to relax the rule, because agents and attorneys cannot swear *positively* as to the residence of the debtor, but only as to their *information and belief*. The Legislature have thought proper to relax the rule in regard to the *indebtedness*, but have not done so as it regards the *residence* of the debtor; and until the Legislature shall interfere, we feel constrained to adhere to the words of the Statute.

Let the judgment of the Court below be affirmed.





# I N D E X .

## ABATEMENT OF ACTIONS.

1. The old Common Law maxim, that a personal right of action dies with the person, still applies where a *tort* is committed to a man's person, feelings or reputation, as for assault, libel, or *seduction of daughter*. *Brauner vs. Sterdevant, Adm'r*..... 69

## ADMINISTRATORS, EXECUTORS, &c.

1. An executor may bring ejectment to recover lands, but his right to recover depends upon the will, and that must be produced, as a part of his title. *Sorrell, Ex'r, vs. Ham and another*..... 55
2. A grant in letters testamentary, to administer the goods and chattels, rights and credits of the testator, gives authority to administer the will also, as to the lands. *Ibid.*
3. A bond by an administrator to convey real estate of his intestate, in contemplation of a sale under the *Ordinary's* order is void, and is incapable of being enforced, either at Law or in Equity, as contrary to the policy of the Statute authorizing administrators to sell the real estate of their intestate. *Logan vs. Gigley*..... 114
4. Letters of administration must be granted at the next term of the Court, immediately succeeding the publication of the thirty days' notice of the applicant and citation by the Clerk, unless the application is *regularly* continued by the action of the Court, from term to term, and

- then the parties in interest are bound to take notice of such continuance. *McGehee vs. Ragan*..... 135
5. According to the provisions of the Act of 1838, the widows and orphans of testators and intestates are entitled to a reasonable support and maintenance out of their estates, for the space of twelve months immediately after the death of such testator or intestate, whether their estates be solvent or insolvent. *Hopkins vs. Lang, Ex'r.* 261
6. For the purpose of marshaling the assets of an insolvent estate, the executor or administrator may file his bill and obtain a decree, not only for the purpose of reducing the property into money, but also of ascertaining the order in which the debts are to be paid. *The Macon & Western R. R. Co. vs. Parker*..... 377
7. An administrator with the will annexed, has no authority to administer upon any portion of the estate of the testator not disposed of by the will. *Harper, Adm'r, vs. Smith*..... 461
8. The mode of procuring letters dismissory specified. *Loyless and Wife vs. Rhodes and another, Ex'rs*..... 547
9. An executor postponing a settlement with one of the legatees under false pretences, and finally delivering over the entire estate to the other legatees, will not be protected by his letters of dismission. It is a fraud in fact, which will vitiate his discharge. *Ibid.*
- See *Abatement*, 1. *Appeals*, 1. *Judgment*, 9. *Practice Superior Court*, 1. *Widow*, 1, 2.

### ADVANCEMENTS.

See *Widow*, 1.

### ADVERSE POSSESSION.

See *Charge of the Court*, 3, 4. *Limitation of Actions*.

ADVERTISEMENT.

See *Forthcoming Bonds*, 3. *Sheriff's Sale*, 1.

AGENT.

See *Constable*, 1. *Principal and Agent*. *Sheriff's Sale*, 2.  
*Satisfaction*, 3, 4. *Trusts and Trustees*, 5, 6, &c.

ALIAS FI. FA.

See *Practice Superior Court*, 3.

AMENDMENT.

1. Where a promissory note is sued on, barred by the Statute of Limitation on its face, and the defendant pleads the Statute, the plaintiff may, under our judicial system and practice, amend his petition by alleging a new promise, so as to prevent the operation of the Statute. *Beard and another vs. Simmons*..... 4
2. A declaration or answer may be amended at any time before the case is finally submitted to the Jury, if the principles of justice require it. *Bryant vs. Hambrick*.... 133

See *Equity Practice*, 1, 6.

ANCIENT DEEDS.

See *Evidence*, 8.

APPEAL.

1. An executor is entitled to appeal without security, when the judgment is to affect only the assets of the decedent in his hands; *aliter*, where the judgment is against him personally, and for which he is responsible out of his own funds. *McCay vs. Devers*..... 184
2. Where one of several parties appealing, signs the bond with security, and the others fail, the appeal is good as to

the party signing, under the Act of 1839. *Weeks and Wife vs. Sego*..... 199

3. An appeal under the Act of 1837, incorporating the Irwinton Bridge Company, carries nothing but the question of damages. *Harrisons vs. Young*..... 359

4. Where the law guaranties to parties the right of appeal, and no time prescribed within which it shall be entered, it must be done within four days from the date of the decision complained of—that being a reasonable time, according to the general law regulating appeals. *The State vs. Dean*..... 405

5. An appeal must be entered by the appellant in person, or by his attorney at law or in fact, duly authorized by warrant for that purpose. *The Com. of Roads, &c. 580th Dis. vs. The Griffin, &c. P. R. Co*..... 487

6. May an attorney at law, who appears on the first trial, enter an appeal without special authority? And is it his duty to do so? *Quere. Ibid.*

See *Claim, 3. Practice Supr. Court, 5.*

### ARREST OF JUDGMENT.

1. It appearing from the statement in the face of the indictment, that the Grand Jury were sworn, it is not competent, on a motion in arrest, to disprove the recital by *aliunde* testimony. *Terrell vs. The State*..... 58

See *Verdict, 3.*

### ASSIGNMENT.

See *Judgment, 16.*

### ATTACHMENTS.

1. Land cannot be levied on and sold under an order of the Magistrates, on attachments returnable to Justices'

Courts. It must be by virtue of an execution issuing upon the judgment in attachment. *Rogers vs. McDill & Campbell*..... 598

2. An attachment sued out by an attorney, on the ground that "he was informed and believed" that the debtor resided out of the State: *held* insufficient. *Deupree vs. Eisenach* ..... 598

BAIL.

1. Bail is usually *absolute* in the first instance; still, if the Magistrate has been deceived, or taken insufficient bail, he may require fresh security. To entitle the sureties in the second bond to their discharge, they must aver in their plea, that the first bond was good and sufficient. And *quere*, whether this would be a good plea? *Spicer vs. The State*..... 49
2. A recital in the judgment of forfeiture, that the principal and bail were called and did not appear, in terms of their undertaking, is sufficient. *Ibid.*
3. The judgment need not specify the amount of the bond. *Ibid.*
4. Where the affidavit to procure bail, stated that the plaintiff *claimed* a certain sum to be due him from the defendant, *held* a substantial compliance with the 13th section of the Judiciary Act of 1799. *Davidson et al. vs. Carter & Ritch*..... 501

See *Bond*, 3. *Practice Superior Court*, 11.

BANKRUPTCY.

1. A certificate of bankruptcy may be attacked and opened in a State Court, when it impedes or conflicts with the rights of a party litigating there, so far as that party's rights are concerned. *Bond vs. Baldwin*..... 9

2. Upon the trial of a claim, upon an issue between the claimant and the plaintiff in execution, upon the question of fraud in procuring a discharge in the Bankrupt Court by the defendant in *fi. fa.* the mercantile books of a firm of which the defendant in *fi. fa.* was a member, before his application, are admissible to show that he was the owner of an interest in that firm not returned in his schedule. *Ibid.*

3. All the acquisitions of a bankrupt made after the filing his petition in bankruptcy, are exempt from liability to pay debts previously contracted. *Ibid.*

### BOND.

1. It is no plea for a surety, that a bond was obtained by duress. *Spicer vs. The State*..... 49

2. An instrument under the hand and seal of the party executing it, imports a consideration in law, and a demurrer to the admissibility of such an instrument in evidence, for want of consideration, will be overruled. *Rutherford vs. The Ex. Com. Bapt. Conv. &c*..... 54

3. When the names of the sureties to a bail bond are inserted in the obligatory part of the bond, but omitted in the condition: *Held*, that such omission did not alter the legal effect of the instrument. *Davidson et al. vs. Carter & Ritch*..... 501

See *Adm'rs, Ex'rs, &c.* 3. *Failure of Consideration*, 1. *Forthcoming Bond.* *Sheriff*, 2, 3, 4, 6.

### BOND FOR TITLES.

See *Damages*, 1, 2. *Evidence*, 8.

### CHARGE OF THE COURT.

1. Where the Court is requested by counsel to charge on

points of law, which bear upon the case, it is the duty of the Court to charge on the points. *Galt vs. Jackson*..... 151

2. A charge upon an assumed state of facts, not proved before the Jury, is erroneous. *Harrison vs. Thompson*... 310

3. The question of adverse possession is for the decision of the Jury and not the Court. *Beverly and another vs. Burke*..... 440

4. For the presiding Judge to charge the Jury, that the plaintiff's possession is "*uninterrupted, continuous, notorious, sufficient and adverse*," is error, and for which, under the Act of 1849-'50, a new trial *must* be granted. *Ibid.*

See *New Trial*, 10.

### CLAIM.

1. The Claim Laws are *cumulative, permissive*, not *mandatory*. *Whittington vs. Doe ex dem. Wright*..... 23

2. A surety on a claim bond, against whom judgment for damages and costs has been given, together with the claimant, and who has paid off the *fi. fa.* is entitled, under our Statute, to control the same for the purpose of reimbursing himself out of his principal. *Keith vs. Whelchel*..... 179

3. When the Petit Jury in a claim case have returned a verdict giving damages against the claimant, and the verdict is appealed from, and pending the appeal the claim is withdrawn: *Held*, that the case goes on as to the question of damages, and stands for trial as before, and no execution can issue for the damages until the appeal is disposed of. *Strickland vs. Maddox et al.*..... 196

See *Bankruptcy*, 2. *Fraud* 1. *Practice Supr. Court*, 4.

### COLOR OF TITLE.

See *Evidence*, 9. *Lim. of Actions*, 12, &c.



## COMMISSIONS.

See *Judgment*, 12, 13. *Treasurer*, 4, 5.

## COMMITMENT.

See *Criminal Law*, 1, 2.

## CONDITIONAL SALE.

See *Mortgage*, 1. *Deed*, 3, 4.

## CONFESSION OF JUDGMENT.

See *Practice Supr. Court*, 10.

## CONSTABLES.

1. Where a Constable who did not write a good hand requested a Justice of the Peace, in *his presence*, to make a return of "no property" on two *fi. fas.* he knowing the return to be true, of his own personal knowledge: *Held*, that the return was to be considered as the act of the Constable himself, and valid in law. - *Ellis vs. Francis..* 325
2. It is the duty of the Constable to make an entry of service on a warrant or summons, in writing, and to sign such return. *Fitzgerald vs. Adams and another.....* 491

See *Evidence*, 19.

## CONSTITUTIONAL LAW.

1. The Act of 1834, authorizing the Inferior Courts to grant the right of private ways, in certain cases, containing no provisions for making any just compensation to the owners of the land through which it might pass: *Held*, to be unconstitutional and void. *Brewer vs. Bowman.....* 37
2. A legislative exposition of a doubtful law, is the exercise of a judicial power; and if it interferes with no vested rights—impairs the obligation of no contract, and is

not in conflict with the primary principles of our social compact—it is in itself harmless, and may be admitted to retroactive efficiency. But if rights have grown up under a law of somewhat ambiguous meaning, it cannot interfere with them. *McLeod vs. Burroughs*..... 213

3. The constitutionality of the Acts of the Legislature of 1832-'3, authorizing the Governor to appoint a Receiver to take charge of the assets of the Bank of Macon, and clothing him with power to maintain all suits, &c. affirmed. *Carey, assignee, vs. Giles*..... 253

4. The appointment of a Receiver by the Legislature to settle the affairs of an insolvent bank, is not a judicial Act. *Ibid.*

5. The remedy, the mode and manner of enforcing contracts, is no part of their obligation, and is within the legislative control. *Ibid.*

6. The solemn Act of the Government will not be set aside by the Courts, in a doubtful case. The incompatibility or repugnancy between the Statute and the Constitution, must be clear and palpable. *Ibid.*

7. Acts of a Legislature constitutionally organized, are to be presumed constitutional, and it is only when they manifestly infringe some of the provisions of the Constitution, or violate the rights of the citizen, that their operation should be impeded by judicial power. Whenever this does happen, from inadvertency, or any other cause, it becomes the duty of the Court to protect the citizen, and vindicate the Constitution. *Ibid.*

8. A Statute passed for the suppression of fraud, or to give a more speedy remedy for the recovery of a right, ought to be construed liberally—such construction being for the furtherance of justice. *Ibid.*

9. Private property may be taken for public use, without compensation, in cases of extreme necessity, without the consent of the owner—*e. g.* pulling down houses to raise bulwarks, &c. *Parham vs. The Justices, &c.*..... 361
10. The general rule is, that private property cannot be taken for public use, without just compensation, and then only by an **Act** of the Legislature, making provision for compensation. *Ibid.*
11. The Legislature must judge of the necessity or utility of the exercise of the right of eminent domain, for public improvements; but in case of great abuse of it, as when, under pretext of public utility, the property of A is taken and given to B, the Courts will interfere and set aside the law. *Ibid.*
12. The provision of the Federal Constitution, that prohibits the taking of private property for public use, without just compensation: *Held*, to be an affirmation of a great principle of the Common Law. *Ibid.*
13. The laws of this State which authorize the opening of public roads over unenclosed lands, without just compensation: *Held*, to be void. *Ibid.*
14. The value of land taken for public use, is not restricted to its agricultural or productive qualities; but inquiry may be made as to all other legitimate purposes, to which the property could be appropriated. *Harrisons vs. Young*... 359
15. For an interference with his private right of ferriage, the owner is entitled to compensation. *Ibid.*
16. The Legislature, or the Inferior Court as its agent, after having chartered a company to make a particular improvement for public accommodation, without any provision that no rival improvement should afterwards be authorized, may grant a charter to another company or individual, to make an improvement of the same, or of a

different kind, to afford the like accommodation, however the work of the junior company might impair, or even destroy the profits of the elder. *Shorter et al. vs. Smith et al.*..... 517

17. It is competent for the Legislature to grant charters with exclusive privileges, but should a change in the business, population, and intercourse of the country require it, new avenues may be opened within the limits of such exclusive grants, by providing just compensation. *Ibid.*

18. There is no difference between a franchise and any other property in this respect ; all may be made subservient to the public use, provided the public faith be not violated in making adequate remuneration. *Ibid.*

See *Criminal Law*, 7. *Grants*, 1, 2, 3, 4, 5. *Statutes*, (construction of.)

## CONSTRUCTION OF STATUTES.

See *Statutes*.

## CONTINUANCE.

1. Where the offence has been recently committed, and the party accused imprisoned during the whole time which intervened between his arrest and trial, it is good cause of continuance, in a capital case, at the first term after the bill is found, that the defendant cannot come safely to trial on account of the excitement in the public mind, against him ; and the affidavit of the prisoner, when made and filed in terms of the law, cannot be contradicted or traversed, either by a cross-examination or *aliunde*-proof. *Bishop vs. The State*..... 121

2. A defendant in a criminal cause, at the 2d term, moves to continue, on the ground that a material witness was absent, who had been subpoenaed and recognized to appear, and his expenses tendered to him, and that he ex-

pected to prove by him, that one of the witnesses expected to be introduced and relied on by the State, said "that if hard swearing would send defendant to the penitentiary, he should go:" *Held*, that the showing was sufficient. *Fox vs. The State*..... 373

It is not competent for the Court to refuse a continuance after a legal showing has been made, upon the ground of the Court's ~~private~~ knowledge of the good character of the witness sought to be impeached by the testimony of the absent witness, and the Court's want of confidence in the integrity of the party moving the continuance. *Ibid.*

### CORPORATIONS.

See *Grants*, 1 to 5. *Plank Roads*. *Statutes*, construction of, 1, 2, 3.

### COSTS.

See *Nuisance*, 1. *Sheriff*, 1.

### COSTS IN CRIMINAL CASES.

See *Criminal Law*, 3, 4, 5.

### COUNTY TREASURER.

See *Treasurer*.

### CRIMINAL LAW.

1. A warrant to arrest a person accused of crime *before* indictment, must specify the offence, the authority under which it is issued, the person who is to execute it, and the person to be arrested; and the warrant of commitment must describe the offence plainly and fully, and the time and place of its commission. *Brady vs. Davis*... 73

2. A *Bench* warrant, and a warrant of commitment *after* indictment, are sufficient, if they recite the fact of indictment, and describe the offence generally. *Ibid.*

3. An officer arresting a criminal, is not authorized to charge "railroad fare" in his bill of costs—he is only authorized to charge *mileage*, and if the officer conveys the prisoner upon the railroad, it is at his own responsibility. *Peters, alias Simpson vs. The State*..... 109
  
4. Each County is bound by law to keep a good and sufficient jail for the safe **keeping** of criminals, at *the charge of the County*, and if **there is not such a jail**, and a guard is necessary for **their safe-keeping**, the expenses of such guard must be paid by the County, and not by the defendants who may be guarded. *Ibid.*
  
5. When the defendant is convicted, and cash funds are in the hands of the arresting officer, belonging to defendant, judgment should be entered for costs, according to the Acts of 1820 and 1830, and the money applied to its satisfaction—the balance paid over to defendant. *Ibid.*
  
6. Where it appeared from the minutes of the Court, on a particular day, that one of the Grand Jurors had been excused for the balance of the term, and also that a true bill had been returned on the same day by the Grand Jury against a defendant, in which the name of the excused Juror was inserted: *Held*, that the minutes of the Court did not afford even presumptive evidence, that the bill of indictment was found by the Grand Jury, after the excused Juror had left the body of his fellow Jurors, and was not sufficient to quash the bill of indictment. *Thompson vs. The State*..... 210
  
7. The constitutionality of the Act of 1850, ~~authorizing~~ the trial of slaves before the Superior Court ~~sustained~~. *Anthony vs. The State*..... 264
  
8. In prosecutions under that Act: *Held*, not to be necessary to aver the preliminary proceedings before the Magistrates in the bill of indictment, nor to prove them on the trial. *Ibid.*

9. In prosecutions under this Act, for *murder*, and verdict for *manslaughter*: *Held*, that the Superior Court may pass sentence and inflict the punishment provided by law for manslaughter. *Ibid.*
10. There is no restraint on the power of the State's Attorney to enter a "*nolle prosequi*," on any bill of indictment, with the concurrence of the Court, provided the case has not been submitted to a Jury. *Durham vs. The State*..... 306
11. The 18th section of the XIVth division of the Penal Code, allowing any person against whom a true bill of indictment is found, for an offence not affecting life, to place on the minutes of the Court a demand for trial, and entitling the accused to be absolutely discharged and acquitted of the offence, if such person is not tried at the term at which the demand is made, or at the next succeeding term thereafter, is imperative in its language and admits of no exceptions—trial or acquittal are the only alternatives. *Durham vs. The State*..... 306
12. On the trial of slaves or free persons of color under the Act of 1850: *Held*, that it was illegal to admit in evidence the opinion of the committing Magistrates, that the person charged was guilty of a capital offence. *Allen, a slave, vs. The State*..... 492
13. When a capital offence is committed by a slave, during the session of the Superior Court, and the papers are returned, it is competent for the Court to proceed to trial at that term. *Ibid.*

See *Continuance*, 1, 2, 3. *Jury*, 2. *New Trial*, 5.

## DAMAGES.

1. In an action on a bond for titles, the measure of damages is the value of the *land* at the time the titles should have been made. *Bryant vs. Hambrick*..... 133

2. By making a proper case in Equity, a vendee will be entitled to recover the value of the beneficial and permanent improvements put upon the premises. *Ibid.*

See *Claims*, 3. *Constitutional Law*, 13, 14. *Ejectment*, 1, 2, 3. *Practice Supreme Court*, 2.

## DEED.

1. Where a deed conveyed a negro to certain parties, and added "*provided always* that this deed of gift shall be the property of J. T. until M. T. arrives at the age of 21 years:" *Held*, that J. T. took no title to the property conveyed. *Maulden vs. Thomas et al.*..... 174
2. A copy deed established according to law, is to be taken in lieu of the original, for all purposes whatever. *Beverly and another vs. Burke.*..... 440
3. A reservation in a deed, for the benefit of the grantor, must be strictly complied with. *House et al vs. Palmer.*.. 497
4. If the vendor in selling a lot of land, retains the right to test it for gold within 18 months, and if found profitable to work it, he must make the examination and give notice of the result within the time limited—otherwise the privilege will be forfeited. *Ibid.*

See *Registry*, 1, 2, 3, 4.

## DEMAND.

See *Criminal Law*, 11. *Promissory Notes*, 1. 2.

## DISTRIBUTION OF MONEY.

See *Equity*, 10, 11, 12, 15, 17, 18.

## DORMANT JUDGMENT.

See *Judgment*, 14.



## DOWER.

See *Widow*, 2.

## DURESS.

See *Bond*, 1.

## EJECTMENT.

1. Against a claim for *mesne* profits in the nature of damages, the value of the improvements made by the defendant, is a fair set-off, provided he took possession of the premises, *bona fide*. *Beverly and another vs. Burke...* 440
2. *Trespassers* are not entitled to the benefit of this principle, except where the profits of the premises have been increased by the repairs or improvements which have been made. In that case, it is proper for the Jury to take into consideration the improvements or repairs, and diminish the profits by that amount, but not below the sum which the premises would have been worth without such improvements or repairs. *Ib.*
3. Whether the defendants are trespassers, is a question of fact, to be submitted to the Jury. *Ib.*

See *Administrators, Executors, &c.* 1. *Lim. of Actions*, 12 to 15.

## EQUITY.

1. Inadequacy of price, as a general proposition, will not, *per se*, be a sufficient ground to set aside a conveyance; yet that, taken in connection with other circumstances of a suspicious nature, may afford such a presumption of fraud, as will authorize the Court to set it aside. *Wormack vs. Rogers and another, administrators.....* 60
2. Where G obtained the legal title to land, as *security* for the money advanced by him to R, the *vendor*, for J, the

*vendee*, promising to re-convey the same to J, on the repayment of the sum so advanced, with 20 per cent. interest, but fraudulently sold the land to a purchaser with notice : *Held*, that under such circumstances, a Court of Equity would adjudge the defendants *trustees* for the party defrauded, and decree a specific performance of the contract, or pecuniary compensation for the property.

*Jackson vs. Gray and another*..... 77

3. On motion to dissolve an injunction upon coming in of answer, exceptions filed are no objection to the motion, unless they affect the answer in parts relating to the grounds of the injunction. *Lewis vs. Leak and another*... 95

4. Where the answer of the defendant is not responsive to the bill, but sets up affirmative allegations, in opposition to, or in avoidance of the complainant's demand, the answer is of no avail in respect to such allegations, on a motion to dissolve an injunction ; and if replied to, the defendant, on the trial, is as much bound to establish such allegations by independent proof, as the complainant is to sustain his bill. *Ib.*

5. No one can maintain an action for a wrong done, where he has consented or contributed to the act which occasions the loss. Hence, if a complainant seeks to recover for an act of defendant, which he charges to be fraudulent, it is not a fraud against him if it was done in pursuance of an agreement between himself and the defendant. *Peacock vs. Terry*..... 137

6. A complainant who participates in an act in violation of the laws of the land, is not entitled to relief in Equity against the consequences of such act. *Ib.*

7. A party who goes into Equity to seek relief against an usurious contract, who has paid principal and legal interest of the debt, must aver that fact in his bill ; and if any

remains unpaid, that he is ready and willing, and now offers to pay the balance. *Ib.*

8. A conveyance of property to prevent the lien of expected judgments from attaching, is illegal, and the party so transferring his property will not be aided by a Court of Equity in reclaiming it. *Galt vs. Jackson*..... 151
9. Where a complainant in a bill, claims one general right to property in the possession of two defendants, notwithstanding that right may be derived from distinct sources, a demurrer for multifariousness will be overruled. *Nail vs. Mobley, administrator, &c.*..... 278
10. The rule that the joint estate is to discharge the joint debts in the first place, and the separate estate the separate debts, and that neither can invade the funds of the other, until the particular class of debts is satisfied out of it, considered and questioned. *Cleghorn vs. The Insurance Bank of Columbus*..... 319
11. Even admitting the rule as a principle of general Equity, it will not be enforced to the exclusion or postponement of the joint creditors, so long as they have recourse *at Law* against the separate estate. *Ib.*
12. It is only when the legal recourse of the joint creditors against the separate estate is terminated, and they have no claim against those assets, except in Equity, as in case of the death, bankruptcy, (or perhaps statutory assignment in insolvency,) of a partner, that the joint creditors are postponed. *Ib.*
13. A Court of Equity does not, as of course, assume jurisdiction in taking executions upon judgments *at Law*, into its own hands, as such power would be oppressive, both to the debtor and the Court. *The Macon and Western R. Road Company vs. Parker*..... 377
14. The presumption is, that a Court that renders a judg-

ment is competent to enforce it, and it is only in special cases that Chancery interferes. *Ib.*

15. Where there are sundry *fi. fas.* against an insolvent Rail Road Company, threatening to seize and sell the road, with its equipments—extending one hundred miles in length, through six different Counties—Equity will take jurisdiction of the matter; direct a sale of the entire property for the benefit of all concerned; and distribute the fund according to the practice and usage in Chancery, in a creditor's suit against executors and administrators. In such a case, no other Court but that of Chancery, possesses adequate jurisdiction to reach and dispose of the entire merits. *Ib.*

16. To allow the road to be cut up into fragments, and separate portions sold at different sales, in the different Counties through which it passes, to different purchasers, would not only sacrifice the rights and interests of creditors, but defeat the objects and intentions of the Legislature in granting the charter. *Ib.*

17. Any creditor who has a claim upon the fund, but who is not a nominal party to the suit, may make himself a party thereto in fact, by coming in and presenting his claim under the decree, and submitting himself to the jurisdiction of the Court for its settlement and adjustment, upon the fund to be distributed. *Ib.*

18. If he neglects or refuses to come in and entitle himself to the benefit of the decree, Equity will not assist him to set aside and annul the proceedings under it. *Ib.*

19. The powers of Equity will be invoked to aid the defects of the Law, and where the facts and circumstances of the case are novel and peculiar, analogous principles will be applied to the existing emergencies. *Ib.*

20. Chancery will exercise the power of reforming a written

contract sparingly and with great caution, and only upon the clearest proof of the intention of the parties and of the accident or mistake upon which the jurisdiction is invoked. *Reese vs. Wyman et al.*..... 430

21. Chancery will reform a written contract, upon proof that the writing does not exhibit the contract as it was agreed upon by the parties at the time, and that the parts omitted were omitted by accident, mistake, inadvertence, or fraud. *Ib.*
22. If one in treaty with another for the sale of property, misrepresents a material fact, stating it to be true, when at the time he knows it to be false, and the other party trusts to the statement and acts upon it, it is a positive fraud, for which Equity will rescind the contract. *Ib.*
23. Such a fraud may be perpetrated by acts as well as by words, and by any artifices designed to mislead. *Ib.*
24. Whether a party thus misrepresenting a fact, knows it to be true or not, is wholly immaterial. *Ib.*
25. Where the party affirming believes it to be true, it is not a fraud in fact, but a fraud in law. *Ib.*
26. And if a party innocently, by mistake, misrepresent a fact which is material, and to which the other party trusts, it is cause for rescinding the contract; because it operates as a surprise upon him. *Ibid.*
27. Where goods have been purchased in the name of, and on the credit of one copartnership firm, and turned over to another copartnership firm, composed of some of the same individuals, without any *bona fide* or *valuable* consideration being paid therefor: *Held*, that the Court of Equity will aid the judgment creditors of the copartnership making such transfer, to follow the goods into the hands of the transferees, and require them to account for such goods, or the proceeds of the sale thereof, and

apply the same in satisfaction of their judgments. *Dennis and others vs. Ray, receiver, &c.*..... 449

28. A defendant in his answer cannot *charge* himself with the receipt of goods or the proceeds thereof, and also *discharge* himself, by alleging that he has accounted therefor. *Ibid.*

See *Administrators, Executors, &c.* 6. *Damages*, 2. *Evidence*, 1, 14, 15. *Judgment*, 6, 9. *Jurisdiction*, 1. *Lien*, 1. *Lim. of Actions*, 2, 3, 4. *Nuisance*, 3. *Partition*, 1. *Roads, &c.* 3, 4, 5. *Set-off*, 1. *Trust and Trustees*.

### EQUITY PRACTICE.

1. Where the pleadings are made up and the cause on trial, the evidence closed and the argument progressing, it is not competent to amend the bill but for special cause ; and not then, if the amendment introduces a new cause of action. *Peacock vs. Terry*..... 137

2. Facts alleged positively in a bill, are constructive admissions in favor of the defendant, and need not be proven. The complainant cannot deny them if they be not true, but must recover according to the case he makes upon the record. *Ibid.*

3. Two witnesses, or one with corroborating circumstances, will be required to outweigh an answer responsive to a bill, more especially if there be three defendants, all concurring in the same statement. *Galt vs. Jackson*..... 151

4. As a matter of practice, the Supreme Court will not control the discretion of the Court below, in refusing to suspend a cause then on trial, for the purpose of taking up another cause, to permit a defendant's answer thereto to be filed, so as to make it evidence as an answer in the cause then on trial ; especially, when the party who had answered was dead, and there were objections raised to its being filed. *Dennis and others vs. Ray, receiver*..... 449

5. Although it is a **general** rule in Chancery practice, that on the coming in of the answer, plainly and distinctly denying all the facts and circumstances upon which the equity of the bill is based, that the Court will dissolve the injunction; yet in some particular cases, the Court will continue the injunction. The granting and continuing of the process must always rest in sound discretion, to be governed by the nature of the case. *Holt et al. vs. The Bank of Augusta et al.*..... 552
6. After the pleadings are made up and the cause set down for a hearing, the answer cannot be amended upon the ground that the defendant was ignorant of the availability in law of a fact within his knowledge, from the time the suit was instituted, as a defence thereto. *Branch, administrator, vs. Dawson*..... 592

See *Equity*, 17. *Evidence*, 14, 15.

### ERROR.

1. The writ of error is an original writ. *Allen, Ball & Co. vs. The Mayor, &c. Savannah*..... 286
2. The object and effect considered. *Ibid.*
3. It is in the nature of a new suit, and lies only to a *final* judgment. *Ibid.*
4. When a cause is carried up and the judgment of the Superior Court affirmed, it takes effect from the date of the first judgment. *Ibid.*

See *Charge of the Court*, 2, 4. *Ejectment*, 3. *Judgment*, 10, 11. *Practice, (Supreme Court,)* 1, 3. *Statutes*, 3.

### ESTOPPEL.

1. A plaintiff in *fi. fa.* requiring the Sheriff to levy on the *interest* of defendant in a lot of land, is not thereby estop-

ped in another suit from contesting defendant's title to the land. *Morris vs. McCamey*..... 160

See *Waiver*, 1.

EVIDENCE.

1. The admission of *ex parte* affidavits is an exception to the general rule, and is allowable only in *waste* or in cases where irreparable mischief might ensue. *Lewis vs. Leak and another*..... 95
2. When the dispute is as to localities, a diagram drawn in accordance with the testimony of a witness, may be submitted to the Jury without having been first exhibited to the witness, whose evidence it contradicts. *Bishop vs. The State*..... 121
3. Where a bill charges a fraudulent sale and purchase under execution, of complainant's property by defendant, proof of admissions by complainant, that the sale was made in pursuance of an agreement between himself and defendant, is admissible. *Peacock vs. Terry*..... 137
4. Where a witness who resides in the County where the suit is pending, and was in attendance under a subpoena on the first day of the Court, and on that day his testimony was taken by commission, and who, on the day of the trial, was unable to attend the Court from bodily *indisposition*: *Held*, that the testimony could not be read as that of a witness who was unable to attend the Court from age, or bodily *infirmity*, as contemplated by the Act of 1838. *Brooks vs. Ashburn*..... 297
5. To make an indorsement of a payment by the holder of a note, admissible evidence to rebut the presumption of the Statute, it must be shown that it was done by the privity of the promisor, or that it was entered when its operation would be against the interest of the party making it. *Smith vs. Simms, administrator*..... 418



6. Upon such proof being given, it is good evidence for the consideration of the Jury. *Ibid.*
7. If, however, the credit is small, as compared with the amount of the note, and entered just before the bar of the Statute would attach, although proven to have been made at its date—still the Jury would be justified in finding against it. *Ibid.*
8. The registration of a bond for titles to land, not being authorized by law, does not entitle it to be read in evidence without proof of its execution. *Aliter*—if thirty years old, accompanied with proof of possession under it, or if produced pursuant to notice from the opposite party, he claiming an interest under it. *Beverly and another vs. Burke*..... 440
9. What is *color of title*? *Ibid.*
10. A copy deed established according to law, is to be taken in lieu of the original, for all purposes whatever. *Ibid.*
11. If the original deed was never recorded in the County where the land lies, the copy, unless registered, cannot be read in evidence without proof of its execution. *Ibid.*
12. The fact that it was recorded on the *minutes* of the Superior Court, in the course of the proceeding instituted for its establishment, does not dispense with the statutory requirement of registration. *Ibid.*
13. The 47th Common Law Rule of Practice, requiring testimony taken by commission, to be communicated to the adverse party before the cause is called for trial, is *directory* merely. *Ibid.*
14. Where a bill alleged that there was a debt due on a judgment by the copartnership firm of E. W. & J. D. in favor of C. B. and that a *fi. fa.* had issued thereon,

which had been paid off by T. C. & G. J. T. as indorsers ; and upon the trial, a *fi. fa.* was offered in evidence, in favor of C. B. *vs.* E. W. D. as principal, and J. D., T. C. & G. J. T. as indorsers : *Held*, that the evidence was properly rejected, on the ground of *misdescription*, there being no offer to amend so as to make the *allegata and probata* correspond. *Dennis et al. vs. Ray, receiver.....* 449

15. The answer of one copartner to a bill in Equity, filed against the copartnership, which contains admissions against the interests of the company, although not filed as an answer in the cause, may be read in evidence, as a *written admission*, on due proof of its execution. *Ibid.*
16. The rule requiring the production of the best evidence of which the nature of the case is susceptible, is essential to the true administration of justice. *Fitzgerald vs. Adams, &c.....* 471
17. The ~~cases~~ which most frequently call for the application of this rule, are those which relate to the substitution of oral for ~~written~~ evidence. *Ibid.*
18. In all cases where the law requires that the evidence of the transaction should be in writing, no other proof can be substituted, so long as the writing exists and is in the power of the party. *Ibid.*
19. No secondary evidence will be allowed of the original summons to a Justices' Court, and the return of the Constable thereon, until diligent search has been made for this primary proof. *Ibid.*
20. Hearsay evidence admissible to prove birth and pedigree, but inadmissible to create or destroy title to property. *Carter and wife vs. Buchanan.....* 539
21. Whether a father permit property to go home with his daughter immediately upon her marriage, or at any subsequent period, if he suffer it to remain there for a longer

of years, the presumption of law is, that he intended it as a gift. *Ibid.*

See *Bankruptcy*, 2. *Bond*, 2. *Criminal Law*, 12. *Equity*, 20 to 26. *Equity Practice*, 2, 3. *Lim. of Actions*, 2, 8. *Witness*, 1, 2.

### EXECUTION.

See *Constables*, 1. *Equity*, 13 to 16. *Estoppel*, 1. *Judgment*, 14, 16. *Railroads*, 1. *Sheriff*, 1. *Treasurer*, 2.

### EXECUTORS.

See *Adm'rs*, *Ex'rs*, &c.

### FAILURE OF CONSIDERATION.

1. The plea of a *total* failure of consideration to an action upon a contract under seal, on the ground of *fraud*, will be allowed in a Court of Law. *McKnight vs. Killett*..... 532

1. Where the vendee purchased a tract of land of the vendor, took a deed, and went in and continued in possession thereof: *Held*, that in a suit upon the sealed bond of the vendee for the purchase money, he could not, under the provisions of the Act of 1836, plead a *partial* failure of consideration, upon the ground of the fraudulent representations of the vendor; that Act confining the plea of *partial* failure to those cases in which *total* failure could be previously pleaded. *Ibid.*

See *Lim. of Actions*, 6.

### FERRY.

See *Grants*, 2, 3, 4, 5, 6. *Lim. of Actions*, 5. *Statutes*, 1.

### FORFEITURE.

See *Bail*, 2, 3.

FORTHCOMING BOND.

1. In an action on a forthcoming bond given by a claimant, a plea of tender of the property, after the day of sale, is bad. *Mapp vs. Thompson*..... 48
2. Anything said or done by the plaintiff in *fi. fa.* which will amount to a waiver of the obligation to deliver the property at the time and place of sale, is a good defence to an action on the bond. *Ibid.*
3. To charge the obligors, it is necessary that they should be notified of the time and place of sale, and a legal advertisement is sufficient notice. *Ibid.*
4. There is no Statute in Georgia, authorizing an agent to execute a forthcoming bond for property levied on by attachment. *Gilmer vs. Allen*..... 208

FRANCHISES.

See *Statutes*, 1.

FRAUD.

1. Where a person having title to property, of which he is apprised, stands by and suffers it to be sold by the Sheriff, without asserting his title, or making it known to bidders, he cannot afterwards set up his claim; and in such case, even infancy would be no protection, provided the minor had arrived at those years of discretion where a fraudulent intent could be reasonably imputed to him. *Whittington vs. Doe ex dem. Wright*..... 23

See *Adm'rs*, &c. 9. *Equity*, 1, 2, 8, 20 to 26, 27. *Failure of Con.* 1, 2. *Judgment*, 9. *Jurisdiction*, 3.

FRAUDS, STATUTE OF.

See *Equity*, 2.

## FREE PERSON OF COLOR.

~~See~~ *Habeas Corpus*, 1.

## GARNISHMENT.

1. Upon the trial of an issue formed on the answer of garnishees on the appeal, it is competent for them to take exception to the evidence of the plaintiff, tendered to show that he is the assignee of the judgment upon which the garnishment issued. *Dugas vs. Matthews et al.*..... 510
2. The transfer of a negotiable note, upon which suit is pending, *held* to convey such an interest in the judgment obtained thereon, in the name of the transferrer, as will enable the transferee to sue out process of garnishment thereon. *Ibid.*

See *Judgment*, 16.

## GIFT.

~~See~~ *Evidence*, 21.

## GRANTS.

1. A grantee in this country takes nothing by implication, but is confined to the terms of his charter. *Harrisons vs. Young*..... 359  
See also, *Shorter vs. Smith*..... 517
2. Grants to ~~land~~ on watercourses, from the State, *with the appurtenances*, convey no right of *public* ferry. The right of private ferry passes with the fee; and for any interference with this, the owner is entitled to compensation. *Ibid.*
3. The ancient doctrine of the Common Law, that the franchise of ferries, although not declared to be exclusive, is necessarily implied in the grant, is inapplicable to both

the local situation and political institutions of this country.

*Shorter et al. vs. Smith et al.*..... 517

4. This doctrine had its origin in the feudal system, and has undergone great modification, if it has not been entirely abandoned, even in England. *Ibid.*

5. The whole legislative history of this State shows, that the understanding of our people has been, that exclusive privileges are never conferred where none such are expressly given by the charter. *Ibid.*

6. Does a grant to build a bridge confer a ferry right, and *vice versa*? *Ibid.*

See *Constitutional Law. Statutes, (Const. of.)*

## HABEAS CORPUS.

1. Upon a return to a writ of habeas corpus, it appeared that the petitioner had been brought before the Inferior Court, as a *free person of color*, upon a charge of having violated the Registry Laws; and upon a plea of guilty, was sentenced to pay a fine of \$100; and in default of payment, to be hired out until paid; and that respondent had hired him in pursuance of the judgment of the Court: *Held*, that he was detained according to law, in pursuance of a judgment of a Court of competent jurisdiction, and that this Court could not enter into the question, whether he was or was not, a free white person.

*Yancy vs. Harris*..... 535

## HUSBAND AND WIFE.

1. Where a particular mode is pointed out in the marriage settlement, for the disposition of the separate estate of a married woman, she cannot dispose of it in any other way, as where she had power to dispose of it by will, with the dissent and approbation of her trustee. Such

consent ~~is~~ necessary to the validity of a will made by her.

*Weeks and Wife vs. Sego and another*..... 199

2. A married woman is a *femme sole* as to her separate estate, unless controlled by the settlement; and if so restricted, she is a *femme sole sub modo* only, and the mode of disposition prescribed in the instrument must be followed. *Wylly et al. vs. Collins & Co*..... 223

3. The doctrine of the Bible, and of the Common Law, that husband and wife are one, is superseded by the introduction of a new principle from the Civil Law—that they are distinct persons, with distinct property, and distinct powers over it.

See *Lim. of Actions*, 3, 4. *Trusts and Trustees*, 5, *et seq.*

#### ILLEGALITY.

See *Judgment*, 14.

#### IMPROVEMENTS.

See *Damages*, 2. *Ejectment*, 1, 2, 3.

#### INADEQUACY OF PRICE.

See *Equity*, 1.

#### INDICTMENT.

See *Arrest of Judgment*, 1. *Criminal Law*, 6.

#### INDORSER.

See *Promissory Notes*, 1, 2.

#### INFANT.

See *Fraud*, 1. *Limitation of Actions*, 1.

INFERIOR COURT.

1. Their right to sue in certain cases considered. *The Justices, &c. vs. The Griffin Pl. R. Co.*..... 475

See *Plank Roads*, 6.

INJUNCTION.

See *Equity Practice*, 5. *Nuisance*, 3. *Plank Roads*, 5. *Roads and Road Laws*, 2, 3, 4, 5.

INSOLVENT DEBTORS.

See *Prison Bounds*, 1.

INTEREST.

See *Set-off*, 10.

INTERROGATORIES.

See *Evidence*, 4, 13.

JAIL.

See *Criminal Law*, 4.

JUDGMENT.

1. The judgment of a Court of competent jurisdiction, is conclusive as to the facts which it decides, until reversed or set aside; and such judgment cannot be collaterally impeached or contradicted, by evidence which such judgment declares to have been *cancelled and annulled*. *Wiley, Parish & Co. vs. Kelsey, Halsted & Co.*..... 117
2. A judgment rendered by a Court without jurisdiction, is a mere nullity, and may be so held, wherever, and whenever, and in whatever way it is sought to be used as a valid judgment. *Towns, Governor, use, &c. vs. Springer et al.*..... 130



3. The lien of a judgment no longer attaches to property sold by the Sheriff under a younger judgment. The remedy of the creditor is to claim the fund. *Harrison vs. McHenry*..... 164
4. Where a judgment has been rendered by a Court having jurisdiction of the subject matter, and the party against whom it was rendered, such judgment is not void, although the Court rendering it may have erred as to the law—there being no appeal therefrom on account of such error in law, or other irregularity in obtaining such judgment. *Preston vs. Clark*..... 244
5. A judgment rendered by a Court having no jurisdiction of the person and subject matter, is a mere nullity, and may be so held in any Court where it becomes material to the interest of the parties to consider it. *Biggers, Mobley et al. vs. Mobley, adm'r, &c.*..... 247
6. The judgment of a Court having jurisdiction, may be set aside by a decree in Chancery, for fraud or accident, or the act of the adverse party, unmixed with negligence or fault in the complainant. *Ibid.*
7. The judgment of a Court of competent jurisdiction cannot be attacked, collaterally, in any other Court, for irregularity, and in all Courts is to be taken and held as a valid judgment, until it is reversed or vacated. *Ibid.*
8. The judgment of a Court of competent jurisdiction may be set aside by the Court which rendered it, for fraud and irregularity. *Ibid.*
9. Upon a proceeding instituted before the Court of Ordinary, to reverse a judgment discharging an administrator, it is competent to prove a fraud upon the Court, in procuring the judgment of discharge, by proof of representations by the administrator, upon which the Court acted, that he had fully and faithfully settled the estate

and executed his trust, and by proof of acts which falsify those representations. *Ibid.*

See, also, *Loyless vs. Rhodes and another, ex'rs*..... 547

10. Judgments of the Circuit Court which are affirmed, do not lose any lien or priority, by reason of the proceedings in the Supreme Court. *Allen, Ball & Co. vs. The Mayor, &c.*..... 286

11. The pendency of a writ of error does not impair or affect the judgment of the Superior Court until reversed. If affirmed it is binding *ab. initio.* *Ibid.*

12. When a public trust or duty is required to be done by a definite number of persons, a majority may act, as where five commissioners were appointed by the Inferior Court of Marion County, to assess the depreciation of property in the Town of Tazewell, caused by the removal of the County site therefrom: *Held*, that three commissioners were competent to act and make the assessment. *Beall, Treas. vs. The State ex rel. &c.*..... 367

13. Where a special jurisdiction is conferred by the Legislature on commissioners, for the purpose of ascertaining certain facts which they are required to certify, and they do so certify, their certificate is the evidence of their judgment, and is as conclusive as any other judgment upon the particular question submitted to them; it appearing upon the face of such certificate, that they acted within the jurisdiction conferred upon them by the Statute. *Ibid.*

14. An execution which has been levied, and upon which is an entry by the Sheriff, of "*levy indefinitely postponed by the plaintiff's attorney*," is sought to be enforced by a sale of the property levied on more than seven years after the date of the entry: *Held*, to be void upon illegality put in by defendant, under the Act of 1823. *Smith & Merrill vs. Dickson and another*..... 400

15. A judgment which is void for want of jurisdiction in the Court rendering it, cannot, of itself, be noticed for any purpose. *Beverly and another vs. Burke*..... 440
16. Under the Act of 1829, authorizing the transfer of judgments and executions, by written assignment, or control: *Held*, that a formal deed of assignment is not necessary, but that evidence in writing, which shows that the plaintiff has conveyed the interest in the judgment or execution, to the person claiming to be assignee, will be sufficient to enable him to sue out process of garnishment thereon. *Dugas vs. Matthews et al.*..... 510
- See *Arrest of Judgment*, 1. *Bail*, 2, 3. *Claim*, 2. *Criminal Law*, 5. *Equity*, 10, 11, 12, 13, 14, 16, 18. *Set-off*, 1. *Treasurer*, 4.

## JURISDICTION.

1. By the Act of 1820, in all cases where, by the LIII<sup>d</sup> section of the Judiciary Act of 1799, the Superior Courts have Equity powers, the party may institute his suit on the Common Law side of the Court, if he can establish his claim without resorting to the conscience of the defendant. *The Justices, &c. use of Davis, vs. Hemphill*..... 65
2. The jurisdiction in such cases is concurrent. *Ibid.*
3. In cases of fraud, (except fraud in obtaining a will,) Courts of Equity and Courts of Law have concurrent jurisdiction, and the plea of a ~~total~~ failure of consideration to an action upon a contract, under seal, on the ground of *fraud*, will be allowed in a Court of Law. *McKnight vs. Killett*..... 532

See *Judgment*, 1, 2.

## JURY.

1. The affidavit of a Juror will not be received to impeach his own verdict. *Bishop vs. The State*.....

2. When a Juror is put upon triors, it is not competent for counsel to ask him any other questions than those propounded by the Act of 1843. *Ibid.*

See *Criminal Law*, 6. *Ejectment*, 3. *New Trial*, 5, 8, 9. *Practice Supr. Court*, 11, 12.

## JUSTICES' COURTS.

1. The jurisdiction given to Justices' Courts, is to hear and determine suits by *summons* or *warrant*, and a copy of the process is to be served by the Constable, personally, on the defendant, or left at his usual and notorious place of abode. *Fitzgerald vs. Adams and another*..... 471
2. It is the duty of the Constable to make an entry of service on the summons or warrant in writing, and sign such return. *Ibid.*

See *Constable*.

## LAND.

See *Attachment*, 1.

## LANDLORD AND TENANT.

1. Where two are in the joint occupancy of land, the one having no title will, in the absence of all proof, be considered as holding in subordination to him who has the title. *Whittington vs. Doe et al. Wright*..... 23

## LETTERS OF ADMINISTRATION.

See *Administrators*, &c. 4.

## LETTERS DISMISSORY.

See *Administrators*, &c. 8, 9. *Judgment*, 9.

## LETTERS TESTAMENTARY.

See *Administrators, Executors*, &c. 2.

## LIEN.

1. The lien of the vendor for the purchase money of land, will not be enforced in favor of the assignee of the notes given therefor. *Wellborn and another vs. Williams*..... 86

See *Judgment*, 3.

## LIMITATION OF ACTIONS.

1. An adverse possession held during the minority of the true owner, cannot operate against his right. *Whittington vs. Doe ex dem. Wright*..... 23
2. Although the Statute of Limitations applies to constructive trusts, yet it is not available where the legal remedy has not been barred. The Statute does not begin to run in favor of a trust estate, against a debt contracted by an agent thereof, until a return of *nulla bona* against the agent, or his insolvency be legally ascertained. The practice of exhausting the legal remedy against such agent before proceeding in Equity against the trust estate, is in furtherance of justice. *Wylly et al. vs. Collins & Co*..... 223
3. Letters from the indorser to the holder of a note barred by the Statute, which bear date anterior to six years preceding the institution of suit: *Held* to be inadmissible to take the case out of the Statute. *Hoadley vs. Bliss*..... 303
4. Where an action is brought by a *cestui que trust*, to enforce against the trustee the provisions of the trust deed, and he does not deny the complainant's interest in the trust estate, but defends upon other grounds, the limitation to the suit is the term applicable to sealed instruments. *Flynt and Wife vs. Hatchett, trustee, &c*..... 328
5. The Statute does not run against a married woman to whom property had been left in *trust* after her coverture, she being within the exception in the Statute in favor of *femes covert*, in a case where she and her husband are suing in Equity for the recovery of the property. ~~Id.~~

6. Proof of ~~seven~~ years' regular and uninterrupted usage of a public ferry in this State, is *prima facie* evidence of a prescriptive right. *Harrisons vs. Young*..... 359
  
7. Where a suit was instituted on a promissory note, and defendant pleaded a *total* failure of consideration, and alleged a *parol* warranty of the property for which the note was given, as a part of his defence: *Held*, that the plaintiff could not avoid this defence, by insisting on the Statute of Limitations, although more than four years had elapsed from the time of such parol warranty. *Morrow vs. Hanson*..... 398
  
8. Where a Sheriff has received money on a *fi. fa.* the Statute begins to run in his favor from the time it was received. *Thompson vs. The Central Bank*..... 413
  
9. A new promise may be inferred from the fact of part payment of a note within the six years; and this deduction is not only in accordance with the older cases, but is consistent, also, with the later and more approved decisions under the Statute. *Smith vs. Simms, adm'r, &c.*..... 418
  
10. In declaring on a promise, it is not necessary to set it out *in hæc verba*—it will be sufficient to set it out according to its tenor and effect. *Ibid.*
  
11. To make the indorsement of a payment by the holder of a note admissible evidence to rebut the presumption of the Statute, it must be shown that it was done by the privity of the promisor, or that it was entered when its operation would be against the interest of the party making it. *Ibid.*
  
12. If, however, the credit is small as compared with the amount of the debt, and entered just before the bar of the Statute would attach, although proven to have been made at its date, the Jury would be justified in finding against it. *Ibid.*
  
13. ~~Order of title~~ defined. *Beverly and another vs. Burke*... 440

14. Though the title of an adverse ~~possession~~ be ever so defective, yet the true owner must sue ~~within seven years~~, or he is barred his entry. *Ibid.*
15. The question of adverse possession is not for the decision of the Court, but exclusively for the Jury. *Ibid.*
16. How far and to what extent the occupant will be protected in his possessory title? *Ibid.*
17. Where one of four joint and several promisors, promised to pay the debt *before* the Statute of Limitations had operated as a bar, it takes the case out of the Statute as to the others. *Cox, ex'r, vs. Bailey*..... 467
18. More than seven years' notorious, peaceable and adverse use and occupation of gold mines, where the party has gone into possession of the land, under deed, will give a statutory right, notwithstanding the vendor has reserved the exclusive privilege of working said mines. *House et al. vs. Palmer*..... 497
19. Where a family of slaves is held by a common title, adverse possession as to one, is good as to all. *Carter and Wife vs. Buchanan*..... 539

See *Amendment*, 1.

### MARRIAGE SETTLEMENT.

See *Husband and Wife*, 1.

### MARSHALING ASSETS.

See *Administrators, &c.* 6. *Equity*, 15 to 19.

### MESNE PROFITS.

See *Ejectment*, 1, 2, 3.

### MINES.

See *Deed*, 3, 4. *Lim. of Actions*, 17.

**MISREPRESENTATION.**

See *Equity*, 22 to 26.

**MISTAKE.**

See *Equity*, 20 to 26.

**MORTGAGE.**

1. A sale of property by J. to G. and an obligation by G. to reconvey the same property on certain conditions, when the transaction does not create the relation of debtor and creditor between the parties, is not a mortgage, and G. will only be held to a compliance with the terms of his bond. *Galt vs. Jackson*..... 151

**NEW PROMISE.**

See *Lim. of Actions*, 8 to 11, 16.

**NEW TRIAL.**

1. A new trial will not be granted on the ground of newly discovered evidence, when the party making the application might, by the exercise of due diligence, have procured it before the trial. *Beard and another vs. Simmons*..... 4
2. Nor will a new trial be granted on the ground of newly discovered evidence, merely to give the party an opportunity to *impeach* the credit of a witness sworn on the trial. *Ibid.*
3. The admission of illegal testimony on the trial, not objected to at the time, is no ground for a new trial. *Bond vs. Baldwin*..... 9  
See also, *Bishop vs. The State*..... 121
4. The Supreme Court will not control the discretion of the Circuit Court in refusing a new trial, upon the ground that the Jury found contrary to the evidence, except in clear and strong cases of injustice. *Ibid.*



5. It is ground for a new trial, if one of ~~the~~ Jurors, before the trial, makes declarations which clearly indicate that he is not above all exceptions, and that his opinion is not a hypothetical one, dependent upon the *whole* proof, but is formed exclusively in reference to the evidence which shall be adduced on the part of the prosecution. *Bishop vs. The State*..... 121
6. Where the Jury find a verdict contrary to the charge of the Court, and manifestly contrary to law, a new trial will be granted. *Tyler vs. Gray*..... 408
7. A new trial granted upon the ground of newly discovered evidence. *Thompson vs. The Central Bank*..... 413
8. A new trial will not be granted for irregularity in the verdict, in this, that the Jury heard the statements of one of ~~their fellows~~ in relation to the case, in their box, unless a brief of the evidence be filed in pursuance of the rule of Court. *Davis vs. Bowman and another, adm'rs, &c*..... 504
9. The Court will not, in such a case, grant a new trial, if it is clear and manifest that there was evidence sufficient to sustain the finding, wholly independent of the statements made in the jury-box. *Ibid.*
10. Where the law has been fully and fairly submitted to the Jury by the Judge in his summing up, and the Court is satisfied that the verdict is in accordance with the law and justice of the case, a new trial will not be awarded on account of some inaccuracy of language, as to the rights of the parties which may have been used by the Judge, during the progress of the trial. *Carter and Wife vs. Buchanan*..... 539

See *Jury*, 1.

## NOTICE.

See *Evidence*, 8. *Judgment*, 15.

NUISANCE.

1. In a matter of complaint against the Savannah & Ogeechee Canal Company, that they were guilty of a nuisance by obstructing the drainage of the low lands of the Springfield plantation, the City Council of Savannah determined that they were guilty of the nuisance, and that they be notified to remove it within a specified time, by constructing an additional culvert, and in default thereof, that the culvert be built by the City; and *that the Company pay the cost of its construction*: *Held*, that the resolution as to the costs is not a judgment by which the rights of the company are concluded, and that the City Council had power to pass such a resolution. *The Mayor, &c. Savannah vs. The Savannah & Ogeechee Canal Company...* 281
2. A nuisance is anything that worketh hurt, inconvenience, or damage to another; as if one does an act, in ~~itself~~ *lawful*, which, being done in a *particular place*, necessarily tends to the damage of another's property. *Coker vs. Birge.....* 425
3. Where B. was about to erect a Livery Stable with a plank floor, upon a public street in a City, on his own land, within sixty-five feet of a public hotel, owned and kept by C.; and C. having applied for an injunction, alleging that the erection of the stable would cause irreparable injury to his property in said hotel, and result in the loss of health and comfort to himself and family, and in the loss of patronage to his hotel, in consequence of the unhealthy effluvia that would arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein: *Held*, that this would operate as a *nuisance* to complainant, and that he was entitled to the injunction. *Ibid.*

OFFICERS.

See *Treasurer*.

## PAROL EVIDENCE.

See *Equity*, 20 to 26. *Evidence passim*.

## PARTIES.

See *Equity*, 17. *Practice Supr. Ct.* 4.

## PARTITION.

1. Although Courts of Equity have concurrent jurisdiction with Courts of Law, in cases of partition as a general proposition, yet, in this State, if the party has an ample and adequate remedy according to the provisions of our Statute, a Court of Equity will not assume jurisdiction. But when it appears from the case made, that there is any obstacle in the way, so as to render the remedy at Law, less ample and adequate, a Court of Equity will maintain its jurisdiction to remove such obstacle, and grant adequate relief. *Boggs, adm'r &c. vs. Chambers et al.*..... 1

## PARTNERS.

See *Equity*, 10, 11, 12, 27. *Evidence*, 15.

## PATROLS.

1. In an action of trespass for killing a slave, the defendant pleaded the general issue, and at the trial gave in evidence, by way of justification, that he was acting as a patrol man under the 44th sec. of the Act of 1770: *Held*, that so much of that Act as is repugnant to the Judiciary Act of 1799, which requires the defendant plainly, fully and distinctly to set forth his defence in writing, is repealed by the latter Act. *Brooks vs. Ashburn*..... 297

## PLANK ROADS.

1. A plank road company under authority from the Legislature, to construct a plank road between two designated points, have no right to appropriate to that purpose, the

whole of the public highway, without express authority in their charter. *The Justices, &c. vs. The Griffin &c. Plank Road Company*..... 475

2. Where the charter authorizes the company to locate their road upon any part of a highway, when it becomes necessary so to do: *Held*, that in such a grant, the Legislature did not intend that they should be authorized to appropriate the whole course of any highway. *Ibid.*
3. Such a grant, whilst it is to be strictly construed, is to be interpreted so as to secure to the company, beneficial results. The necessity contemplated by the Legislature, is not such a necessity of using a highway, as, without such use, would defeat the enterprise; but a reasonable necessity—as, for example: to avoid constructing a costly bridge over an almost impassable swamp, or an inconvenient or wide departure from the proper direction of the plank road. *Ibid.*
4. The company are to judge of the necessity in the first instance, subject to be finally controlled by the action of the Courts; and whether the necessity exists or not, is a question of fact, to be determined on the production of evidence. *Ibid.*
5. In cases where such necessity exists, the company are bound by their charter, to pay the damages resulting from the appropriation of the highway, to be ascertained in the manner pointed out by the charter, and any departure from the directions therein contained, or fraudulent or collusive acts on the part of the company, in relation to the assessment, will vitiate the whole proceeding, and subject them to injunction. *Ibid.*
6. *Held*, that under the charter of the Griffin & West Point Plankroad Company, and under the general Law, the Inferior Court of Pike County may rightfully institute suit in Equity, to restrain them from violations of their charter. *Ibid.*

8. ~~Some~~ general remarks on plankroads. *The Com. &c. 580th Dist. vs. The Griffin &c. Plankroad Company*..... 487

See *Statute*, 2.

### PLEADING.

1. An allegation, that defendant caused by the erection of a milldam, "an unhealthy pond of standing water," is not sufficient to authorize testimony as to sickness of plaintiff in consequence of the pond. *Morris vs. McCamey*..... 160
2. The plaintiff is not obliged to spread out his proof upon the record. *Gilmer vs. Allen*..... 203
3. If the declaration avers that the principal executed the bond, (which is the subject of suit,) by his agent, it is sufficient. *Ibid.*
4. Under our Judiciary, *profert in curiam* is necessary to be made by the plaintiff, of any note or other instrument which is the foundation of the action. *Smith vs. Simms, adm'r*..... 418
5. In declaring upon a promise it is not necessary to set it out in *hæc verba*. It will be sufficient to set it out according to its legal tenor and effect. *Ibid.*

See *Amendment*, 1. *Failure of consideration*, 1, 2. *Forthcoming Bond*, 1, 2, 3. *Lim. of Actions*, 9. *Patrols*, 1. *Set-off*, 6. *Trespass*, 2.

### POSSESSION.

1. How far and to what extent, the occupant will be protected in his possessory title, considered. *Beverly and another vs. Burke*..... 440

See *Landlord and Tenant*, 1. *Lim. of Actions*, 1, 12 to 15, 18.

## PRACTICE, (SUPR. COURT.)

1. Where a party makes application for letters of administration, and it is resisted by other parties setting up a will, the party applying for administration is the promovant, and entitled to open and conclude the argument to the Jury. *Weeks and Wife vs. Sego*..... 199
2. The defendant by demurring, admits the ability of the plaintiff to sustain all the allegations in his declaration, by proper proof. *Gilmer vs. Allen*..... 208
3. An *alias fi. fu.* cannot regularly issue without an order of the Court for that purpose, which order should set forth all the previous proceedings which had taken place under the original execution. *Watson vs. Halsted, Taylor & Co*.....,..... 275
4. Where a verdict was rendered in a claim case, in which the plaintiff had been dead four years, and whose estate was unrepresented before the Court: *Held*, that the verdict ought to have been set aside, on motion. *Ellis vs. Francis*..... 325
5. On an appeal to the Superior Court from the amount of damages assessed by appraisers, appointed by the Inferior Court, under a special Statute, the party originally moving in the case below, is entitled to open and conclude. *Harrisons vs. Young*..... 359
6. Where testimony is suffered to go to the Jury without objection, and no effort is made to withdraw it from their consideration, it is too late, after the argument has closed, to call upon the Court to charge the Jury that it was illegally admitted. *Ibid.*
7. Exceptions to the sufficiency of a rule against the Sheriff, taken upon the trial, 18 months after the filing of the rule, come too late. *Thompson vs. The Central Bk*..... 413

- 8. After issue has been joined on the merits, it is too late to demur to the declaration, for want of *profert* of letters of administration. *Smith vs. Simms, adm'r*..... 418
- 9. Where a party confesses judgment against himself, under a mistake of fact as to what the pleadings contain, he may, upon discovering his error, retract the confession, provided it has not been recorded. *Ibid.*
- 10. The 47th Common Law Rule of Practice, requiring testimony taken by commission to be communicated to the adverse party before the cause is called for trial, is *directory* merely. *Beverly and another vs. Burke*..... 440
- 11. On the trial of a *sci. fa.* against bail, the defendants are not entitled to a Jury trial, unless they file such an issuable plea as will require the intervention of a Jury to try it. *Davidson vs. Carter & Ritch*..... 501
- 12. When it appeared on the face of a record that there was a competent number of Jurors to render a verdict, such verdict may be signed by one as foreman, in behalf of himself and his fellow Jurors. *Ibid.*

See *Appeal*, 4. *Arrest of Judgment*, 1. *Bail*, 2, 3. *Continuance*, 1, 2, 3. *Garnishment*, 1, 2. *New Trial*, 8. *Sheriff*, 1. *Treasurer*, 3. *Waiver*, 1.

PRACTICE, (SUPREME CT.)

- 1. Where the decision of the Court on a motion for a new trial is excepted to, it is not competent for plaintiff in error to assign error upon decisions not excepted to, and not embraced in the motion for a new trial. *Bond vs. Baldwin*..... 9
- 2. Where a writ of error is dismissed, no damages are recoverable on the cause in the Court below. *Collins vs. Turner*..... 112

3. A writ of error **does** not lie from a voluntary nonsuit.  
*Kent vs. Hunter*.... 207
4. Neither by the Common Law nor the Act authorizing the Supreme Court in this State, is a writ of error, a *supersedeas*, unless bond and security is given. *Allen, Ball & Co. vs. The Mayor, &c.*..... 286
5. The brief of the evidence filed on a motion for a new trial, is not a part of the record to be transmitted to the Supreme Court; and it does not dispense with the necessity of incorporating in the bill of exceptions, a brief of the trial and copy of the written evidence. *Wetmore vs. Chavers*..... 546

See *Equity Practice*, 4. *Error*, 1, 4.

### PREScription.

See *Lim. of Actions*, 5.

### PRESUMPTION.

See *Evidence*, 21.

### PRINCIPAL AND AGENT.

1. A payment to the authorized agent, is a payment to the principal. *Hodnett vs. Tatum*..... 70
2. The principal cannot ratify the acts of his agent in part, and repudiate in part, in relation to the same transaction. He must either adopt the whole or none. *Ibid.*
3. Though a subsequent ratification by a principal will confirm an assumed agency, not so, if the agency be in itself illegal. *Harrison vs. McHenry*..... 164

See *Constable*, 1. *Forthcoming Bond*, 4. *Satisfaction*, 3, 4. *Trust and Trustee*, 6, 7, 8.



## PRISON BOUNDS.

1. A defendant arrested under *ca. sa.* and allowed prison bounds, is still in the custody of the Sheriff, and he must place him in confinement at the end of six months, without any special order. *Jackson & Co. vs. Cox*..... 172

## PRIVATE WAYS.

See *Constitutional Law*, 1.

## PROFERT.

See *Pleadings*, 4. *Practice Supr. Court*, 9.

## PROMISSORY NOTES.

1. A note made payable *at either of the banks in Macon*, held to be within the proviso to the Act of 1826, which dispenses with demand and notice to charge an indorser. *Hoadly vs. Bliss*..... 303
2. An indorser can waive demand and notice before the maturity of the note only. After its maturity, he can waive proof of demand and notice. *Ib.*
3. The following instrument declared a promissory note :  
 "This is to certify that I did, in the year 1844, purchase of B. F. W. his tan-yard and stock; for which I did promise to pay B. T. L. for the benefit of B. F. W. \$475, which amount I hereby acknowledge to be unpaid and yet due; and one note of hand for \$53, which note is said to be lost or mislaid, each amount bearing interest from 1st Jan. 1845. Signed, J. A. S. Sept. 23, 1847."  
*Lowie vs. Murphy, adm'r*..... 338
4. In a suit on a negotiable promissory note, the defendant will not be permitted to question the plaintiff's title to the paper, unless it is made to appear that it is necessary for the purpose of his defence. *Varner vs. Lamar*... 588

See *Garnishment*, 2. *Satisfaction*, 1, 2, 3, 4.

PURCHASERS.

See *Volunteers*, 1.

RAILROAD.

1. Is a railroad subject to levy and sale at Law? *Quere.*  
*The Macon & Western R. R. Company vs. Parker*..... 377

See *Equity*, 15 to 18.

REFORMING CONTRACTS.

See *Equity*, 20 to 26.

REGISTRY.

1. Failure to record a deed concerns no person except those who derive title from the same feoffor, by a deed of subsequent date. *Whittington vs. Doe ex dem. Wright*..... 23
2. The Statute of North Carolina requires deeds of gift to be *proven and recorded* in one year, or else to be void: *Held*, that the *registration* of a deed is not sufficient evidence of *probate*. *Maulden vs. Thomas et al*..... 174
3. A copy deed established by law, cannot be read in evidence, without proof of its execution, unless the original deed was recorded in the County where the land lies. *Beverly and another vs. Burke*..... 440
4. Record on the *minutes* of the Court establishing it, does not dispense with the statutory registration. *Ib.*
5. A bond for titles is not authorized by law to be registered. *Ib.*

See *Evidence*, 8, 11.

RETURN.

See *Constables*, 1, 2.

## ROADS AND ROAD LAWS.

1. The laws of this State authorizing the opening of public roads over unenclosed lands without just compensation : *Held*, to be void. *Parham vs. The Justices, &c..* 341
2. Under the Laws of Georgia which authorize the laying out and opening of public roads over the enclosed lands of the citizen, the Inferior Court may order a review, for the purpose of determining whether a road be necessary or not, and may also order the same to be opened before compensation is made or tendered ; but cannot enter upon and seize, and permanently appropriate the land, until compensation is made or tendered. *Ibid.*
3. A citizen cannot enjoin the opening of a public road over his enclosed lands, when it appears from his bill, that he has not taken the steps pointed out by the law to procure the assessment of his damages. *Ibid.*
4. Nor upon the ground that the reviewers appointed by the Court signed the petition for the road, and took an active interest in getting it up. *Ibid.*
5. Nor upon the ground that it does not appear from the return of the reviewers that they were not sworn according to the requirement of the Statute. *Ibid.*

See *Plankroads*, 1 to 6. *Private Ways*.

## SATISFACTION.

1. One simple contract does not merge or extinguish another. *Wylly et al. vs. Collins & Co.....* 223
2. A bill, acceptance, or promissory note, either of the debtor or third persons, is not a payment or extinguishment of a debt, unless accepted as such. *Ib.*
3. The circumstance of the note or bill being given by an agent of the principal debtor, cannot vary the question. *Ib.*

4. If the written promise of the principal debtor does not discharge the debt, *a fortiori*, the note of the agent can have no higher efficacy. *Ibid.*

SAVANNAH.

See *Nuisance*, 1. *Statutes*, (construction of,) 1, 3.

SEDUCTION.

See *Abatement*, 1.

SET-OFF.

1. Where B. obtained a judgment against W. for \$1200, and subsequently thereto, W. purchased judgments against B. for \$1384, and filed a bill to have the latter judgments set-off against, and in satisfaction of the former: *Held*, that under the Act of 1799, it should *affirmatively* appear that there were no other judgment liens upon the defendant's property, before the Court of Equity would decree satisfaction of a *particular* judgment, and that complainant had an ample and adequate remedy at Law. *Wellborn vs. Bonner*..... 82
2. The judgment and not the execution issued thereon, is the proper subject matter of set-off. *Bryant vs. Hambrick*. 133
3. Against a claim for *mesne* profits in the nature of damages, the value of the improvements made by the defendant is a fair set-off, provided he took possession of the premises *bona fide*. *Beverly and another vs. Burke*..... 440
4. Set-off not allowed by the Common Law. *Meriwether and another vs. Bird, adm'r*..... 595
5. The Statute of 2 Geo. II. c. 22, has been introduced generally into the United States, with some modifications. *Ibid.*
6. Set-off is a plea *in bar* of the plaintiff's action. *Ibid.*

7. The commencement of the action and not the time of trial, is ordinarily the period at which mutual debts are to be set-off against each other. *Ibid.*
8. The doctrine of **set-off** was borrowed from the Civil Law, and should be interpreted by the same principles of construction. *Ibid.*
9. Justice demands that the claim of the debtor not bearing interest, should be set-off against that of the creditor drawing interest, as of the time it became due and owing. *Ibid.*
10. Our Statute **disallowing interest** on open accounts, does not in any way affect the law of **set-off**. *Ibid.*

See *Ejectment*, 1, 2, 3.

## SHERIFF.

1. Where a Sheriff seized and sold the property of a defendant for an amount larger than the sum due on the execution, and returned that the proceeds of the sale were taken for *costs*, without specifying what costs : *Held*, that such a return was neither legal nor proper, and that it was his duty to state distinctly in his returns, the particular items of costs for which the money arising from the sale of the defendant's property, was appropriated. *Harrison vs. Thompson*..... 310
2. A Sheriff's bond taken and approved by the Inferior Court, and averred to have been delivered to the Governor of the State, and signed and sealed, and attested by *two* of the Justices of the Inferior Court : *Held*, to be good as a voluntary, but bad, as a statutory bond, because not given within thirty days after the election of the Sheriff. *Crawford, Gov. &c. vs. Howard and others*..... 314
3. A Sheriff duly elected, but not having executed a bond according to law, within thirty days after his election, is

**an officer *de facto***, and his acts are valid when they concern the public or third persons who have an interest in them. *Ibid.*

*Omitted in proper place—page 652.*

# SLAVERY.

1. In cases of felony, the civil remedy is suspended until the offender is prosecuted to conviction or acquittal. *Neal vs. Farmer*..... 555
2. African slavery held never to have existed in the Island of Great Britain by the Common Law, by Statute, or by the Laws of Nations. *Ibid.*
3. The Law of Villenage obsolete in England. *Quere?* *Ibid.*
4. If not obsolete, but of force in 1732, when the Colony of Georgia was settled: *Held*, that it had no application to African slavery in England or in Georgia. *Ibid.*
5. The Common Law of England held to be inapplicable to the institution of slavery, except to protect the rights of masters. *Ibid.*
6. The slave trade held to be recognized as a lawful commerce, under the Law of Nations, and that law obligatory upon the States of the world, unless repudiated by treaty or positive law. *Ibid.*
7. *Held*, that by the comity of nations, when a slave escapes into, or is found within the jurisdiction of a State where slavery is not recognized, it is the duty of that State, upon the demand of his rightful owner, to deliver him to be taken back to the State where by law, he is a slave. *Ibid.*
8. The origin and character of property in slaves in this State defined. *Ibid.*
9. It is not felony in Georgia, by the Common Law, to kill a slave, and the only legal restraint upon the power of the master over the person of the slave in Georgia, is such as is imposed by Statute. *Id.*

CHAPTER 10. A SHERIFF'S DUTY.....

2. A Sheriff cannot purchase at his own sale, neither for himself nor as agent for another; such purchase is void. *Harrison vs. McHenry*..... 164

7. The commencement of the action and not the time of trial, is ordinarily the period at which mutual debts are ~~to be set off against each other.~~ *Ibid* . . . . .

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**an officer *de facto***, and his acts are valid when they concern the public or third persons who have an interest in them. *Ibid.*

4. The Sheriff and his surties held liable on a voluntary bond, for the acts of his deputies, although it contains no stipulation to that effect: *Held*, that such a stipulation is not necessary to the validity of a Sheriff's bond, under our Statute. *Ibid.*
5. When a Sheriff has received money on a *fi. fa.* the Statute of Limitations commences to run in his favor, from the time it was received. *Thompson vs. The Central Bank*..... 413
6. A bond being taken and approved by the Justices of the Inferior Court, to protect the people of the County from the official misconduct of the Sheriff elect, it is not competent for these same Justices to discharge this obligation by the substitution of another bond, some thirty days thereafter; especially, where one of the three Justices was a co-obligor in the first bond. *Towns, Gov. &c. vs. Stephens and others*..... 585

See Constables, 1. Practice Supr. Court, 7. Prison Bounds, 1. Sheriff's Sales, 2.

### SHERIFF'S BOND.

See Sheriff, 2, 4, 6.

### SHERIFF'S SALE.

1. When by a special Act, the Sheriff is authorized to advertise his sales in a paper published in the County, it is not necessary to advertise at three of the most public places in the County to make the sale legal. *Mapp and another vs. Thompson*..... 42
2. A Sheriff cannot purchase at his own sale, neither for himself nor as agent for another; such purchase is void. *Harrison vs. McHenry*..... 164



## SPECIFIC PERFORMANCE.

See *Equity*, 2.

## SLAVES.

See *Criminal Law*, 7, 8, 9, 12, 13. *Evidence*, 21. *Patrols*, 1. *Lim. of Actions*, 18.

## STATUTES, CONSTRUCTION OF.

1. The Legislature in a charter declare "that it shall not be lawful for any person or persons, at any time or times, to build any bridge, or keep any ferry on the river Great Ogeechee, within five miles either above or below (another bridge on the same stream :") *Held*, that the distance of five miles is to be measured by the course of the river. *McLeod et al. vs. Burroughs*..... 213
2. Grants of exclusive privileges to corporations or individuals are to be strictly construed; and if the terms of the contract are ambiguous, the ambiguity must operate in favor of the public. *Ibid.*
3. A Statute of the State declaring of full force, all the ordinances of a City, or other corporation, "in operation" at its date, does not embrace one which has been *judicially* pronounced by the *Superior Court* to be *inoperative* before its passage. *Allen, Ball & Co. vs. The Mayor, &c...* 286
4. The phrase "in operation," defined. *Ibid.*
5. Grants from the Legislature to a company, in derogation of common right, are to be strictly construed. *The Justices &c. vs. The Griffin, &c. Plankroad Company*..... 475

See *Constitutional Law*. *Grants*, 1 to 5. *Patrols*, 1. *Plankroads*.

SURETY.

See *Bail*, 1. *Bond*, 1. *Claim*, 2. *Sheriff*, 2, 4.

TORT.

See *Abatement*, 1.

TREASURER, (COUNTY.)

1. It is a condition precedent before a County Treasurer can enter upon the duties of his office, that he should give bond and security, and not having done so, he does not legally hold the office. *Foster vs. The Justices, &c.....* 185
2. Before the Inferior Court can issue execution against a County Treasurer, for a balance in his hands, ten days' notice is required by Statute to be given him; and the order of the Court under which the *fi. fa.* is issued, must show that such notice has been given. *Ibid.*
3. If the order is passed but not entered by the Clerk, it is competent for the Court to place it on the minutes *nunc pro tunc.* *Ibid.*
4. It is not competent for a County Treasurer to resist the payment of a debt, directed by the proper authority to be discharged out of the public funds, set apart in his hands for that purpose, upon the ground that he had been notified that the holder thereof was not the rightful owner of the property upon the valuation of which the certificate had issued. *The State ex rel. Strange vs Bell.....* 334
5. When the Legislature declares that the certificate of certain commissioners, certifying that a particular sum of money is due an individual in consequence of the depreciation of his property by the removal of a County site, shall become a debt against the County Treasurer of such County, no order of the Inferior Court is necessary to authorize the County Treasurer to pay it. *Bell, Treasurer, vs. The State ex rel. Strange.....* 367

## TRESPASS.

1. A plaintiff seeking to recover for injury done his land by the erection of a mill-dam, cannot recover where paramount title is shown in another, by his own evidence. *Morris vs. McCamy*..... 160
  2. Where an immediate act is done by the co-operation, or the joint act of *two* or more persons, they are all trespassers, and may be sued jointly or severally, and any one of them is liable for the injury done by all. To render one man liable in trespass for the acts of others, it must appear, either that they acted in *concert*, or that the act of the party sought to be charged, ordinarily and naturally produced the acts of the others. *Brooks vs. Ashburn*..... 297
- See *Ejectment*, 2, 3. *Pleading*, 1.

## TRUSTS AND TRUSTEES.

1. Trust estates are liable to pay out of their income for goods or services furnished or rendered, and such as are necessary and proper. *Wylly et al. vs. Collins & Co*.... 223
2. A creditor is not bound to ascertain whether the Trustee is, or is not in arrears to the trust estate. *Ibid.*
3. The rule in South Carolina to this effect, ought not to be adopted in Georgia, where no returns are made by trustees, other than executors, administrators and guardians, of their receipts and disbursements. *Ibid.*
4. Future income may be applied to past indebtedness. *Ibid.*
5. A wife and children who have separate property settled upon them, are not bound to support the husband and father, though owing to his insolvency they may be bound to support themselves. *Ibid.*
6. The registry of the deed of settlement, accompanied by the management of the trust property by the husband is, as to third persons, evidence of his agency for the trust property. *Ibid.*

7. Although the husband as such, has no right to control the separate estate of his wife, yet he may, like any other person, do a ministerial act, such as purchasing goods for the trust estate. *Ibid.*

8. Taking the note of the manager of the trust estate, in settlement of the account for goods debited to the manager individually, but which went to the use of the *cestui que trusts*, does not relieve the trust estate from liability to pay out of its income, where it does not appear that exclusive credit was given to the agent. *Ibid.*

See *Husband and Wife*, 1, 2, 3. *Judgment*, 12. *Lim. of Actions*, 2, 3, 4.

## USURY.

1. At Common Law, a contract which is not tainted with usury in its inception, is not made usurious by a subsequent agreement to pay usury in consideration of forbearance. *Troutman vs. Barnett et al.*..... 30

2. Under our Statutes, if a judgment not tainted with usury is transferred, and the transferee agrees with the defendants to forbear its collection for a term of time, in consideration of usurious interest paid him, such subsequent agreement is usurious, and affects the judgment so far as to make the principal due thereon, only collectable. *Ibid.*

See *Equity*, 7. *Witness*, 1.

## VENDOR'S LIEN.

See *Lien*, 1.

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1. Where the Jury in an action of trespass against two joint trespassers, returned the following verdict: "We the Jury, find Simpson, \$150, and Edwards \$100, and all the costs to be paid by Simpson and Edwards; and fifty dollars dam-  
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ages to be paid by Simpson :” *Held*, that the legal effect of the verdict was, that the Jury intended to find \$200 damages against Simpson, the principal trespasser, and that a joint judgment should be entered against both defendants for that amount ; and a remittiter entered as to the \$100 found against Edwards. *Simpson and Edwards vs. Perry*..... 508

2. Verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity. *Simons et al. vs. Rarden and wife*..... 543

3. Where a bill was filed by John A. Rarden and Henrietta his wife, (formerly Henrietta Ogletree,) to recover certain slaves in right of his wife, and the Jury on the trial of the cause, found the following verdict : “ We the Jury find and decree, that the complainant, Henrietta G. Rarden, (formerly Henrietta G. Ogletree,) in her own right, and for her own use, do recover of the defendant the negro slaves, &c.” *Held*, on a motion in arrest of Judgment on the ground, that the verdict did not find in favor of the marriage of the parties, which was denied by the defendant’s answer, that the legal effect of the verdict was in favor of the marriage. *Ibid.*

See *Practice Supr. Court*, 4, 12.

VOID CONTRACT.

See *Administrators, &c.* 3. *Sheriff’s Sale*, 2.

VOLUNTEERS.

1. A conflict between the equities of a *bona fide* purchaser and a *volunteer*, can only arise where both parties claim under the same grantor. *Whittington vs. Doe ex dem. Wright*..... 23

WAYS.

See *Constitutional Law*, 1.

WAIVER.

1. Where an *alias fi. fa.* has been issued by the Clerk without an order of the Court, the objection to the regularity of the proceeding comes too late, after the parties had litigated a claim case under such *alias fi. fa.* The defect will be considered as having been waived. *Watson vs. Halstead, Taylor & Co.*..... 275

See *Promissory notes*, 2.

WARRANT.

See *Criminal Law*, 1, 2.

WARRANTY.

See *Lim. of Actions*, 6.

WASTE.

See *Evidence*, 1.

WIDOW.

1. The widow of an intestate is not entitled to have advancements made by the intestate to his children brought into hotchpot for her benefit. *Beavers, ex'r. vs. Winn, ad'mr.*.. 189
2. The widow dying in less than one year after administration upon the estate of her husband, without having elected to take a child's part of the real estate, her executor cannot recover it after her death. *Ibid.*
3. She is entitled to her year's support, whether the estate be solvent or insolvent. *Hopkins vs. Lang, executor.*..... 261

See *Husband and Wife*, 1.

## WITNESS.

1. In an action against the surety to a note to which the defence was usury: *Held*, that the maker, upon being released from all liability, was a competent witness for the defendant. *Barnett et al. vs. Troutman*..... :
2. A witness may be interrogated as to the state of his feelings towards a party, in order to show the bias under which he testifies. It is not competent to inquire into the cause of his hostility. *Bishop vs. The State*..... 1

See *Evidence*, 2.

## WRIT OF ERROR.

See *Error*.















